No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
Petitioner,

v.

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act forbids citizen enforcement suits when a "State has commenced and is diligently prosecuting a civil . . . action in a court of . . . a State to require compliance with the standard, limitation, or order" allegedly violated. 33 U.S.C. § 1365(b)(1)(B).

This case raises the following questions:

1. Whether a final state court order requiring a publicly owned wastewater treatment works to comply with a State's remediation plan bars continuation of a federal court citizen suit asserting the same violations, either as a matter of res judicata or because of the State's "diligent[] prosecut[ion]."

2. When a state court order is entitled to preclusive effect against citizen plaintiffs under state law (and, therefore, under 28 U.S.C. § 1738 and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985)), whether a federal court may refuse to give that order preclusive effect until it independently decides, after a detailed examination of the order's remedial plan, that there is no "realistic prospect" of continued violations after the plan's projects are completed.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner, defendant-appellee below, is Milwaukee Metropolitan Sewerage District, a special purpose entity organized under Chapter 200 of the Wisconsin Statutes. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents, plaintiffs-appellants below, are Friends of Milwaukee's Rivers and Lake Michigan Federation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Milwaukee Metropolitan Sewerage District ("MMSD"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition ("Pet. App.") at 1a-33a, is reported at 382 F.3d 743 (7th Cir. 2004). The opinion of the district court, Pet. App. 34a-57a, is reported at 2003 WL 23864869 (E.D. Wis. Sept. 29, 2003).

JURISDICTION

The court of appeals entered judgment on September 2, 2004. Pet. App. 1a. The court denied a timely petition for

rehearing on October 1, 2004. Pet. App. 63a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition presents important questions involving the statutory provision barring citizen suits under § 505 of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1365, when a State diligently prosecutes the same alleged violations. The CWA, 33 U.S.C. § 1251, *et seq.*, makes it unlawful to discharge any pollutant into navigable waters except as specifically authorized. *See* 33 U.S.C. § 1311(a). The Act allows the Administrator of the Environmental Protection Agency ("EPA") or a State that establishes and administers a program meeting federal guidelines to issue permits authorizing the discharge of pollutants in accordance with specified conditions. *See* 33 U.S.C. § 1342(a) & (b). Violations of a state-issued permit are subject to both federal and state enforcement actions. *See* 33 U.S.C. § 1319; *see also* Wis. Stat. §§ 283.31, 283.89, 283.91, 299.95.

In the absence of federal or state enforcement, the Act permits private citizens to commence a civil action against any person alleged to be violating a permit. 33 U.S.C. § 1365(a)(1). "[T]he citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). Congress specifically did not authorize citizens to seek remedies that the government "chose to forgo." *Id.* at 61.

To protect against citizen suit intrusions on government enforcement, the Act requires private parties to give the EPA and the State sixty days' notice of their intent to commence an action. 33 U.S.C. § 1365(b)(1)(A). If, before the expiration of that period, the government has "commenced and is diligently prosecuting, . . . [an] action . . . to require compliance" with the permit, the citizen suit is barred. 33

U.S.C. § 1365(b)(1)(B). Whether this diligent prosecution provision excepts citizen suits from 28 U.S.C. § 1738's requirement that state "judicial proceedings . . . shall have the same full faith and credit in every court . . . as they have by law . . . in the courts of such State . . . from which they are taken," 28 U.S.C. § 1738, is one of the important questions this petition presents.

STATEMENT

The Seventh Circuit held that respondents, two citizen groups claiming "a long history of involvement in clean water activities" (C.A. S. App. 96-97), could continue prosecuting MMSD for alleged CWA violations that the State of Wisconsin resolved through a final state court order. That order, which incorporates a stipulation between the State and MMSD, requires MMSD to spend over $900 million on corrective system improvements. Reversing the district court, the Seventh Circuit held that neither the State's prosecution of MMSD nor the res judicata effect of the state court order barred respondents' action.

Although the district court concluded that the state court order requires substantial remedial measures (Pet. App. 54a-55a), the court of appeals took the view that those measures were "a stalling tactic rather than a compliance strategy." Pet. App. 32a. Having announced this view, the Seventh Circuit instructed the district court to allow respondents' action to proceed, unless the court determines, after a "detailed examination" of the state-ordered remedial projects (*id.* at 33a), that the State met the Act's diligent prosecution standard. *Id.* at 22a, 33a. This diligent prosecution standard, the Seventh Circuit ruled, requires that the State's remedies leave "no realistic prospect that violations due to the same underlying causes . . . will continue after the planned improvements are completed." *Id.* The court of appeals thus interpreted the Act to permit federal courts exercising citizen

suit jurisdiction to interfere with a State's choice of remedies, even when those remedies are mandated by a final state court order.

This interpretation is inconsistent with the Act's text, which bars a citizen plaintiff from *commencing* an action when the State is diligently prosecuting the same alleged violations. It is also inconsistent with the exegesis of the citizens' enforcement role in *Gwaltney,* where this Court ruled that Congress intended the citizen suit as a means of supplementing, rather than supplanting, governmental enforcement. 484 U.S. at 60. Adhering to that interpretation, other courts of appeals, applying either res judicata or the Act's diligent prosecution bar, have held that when the government has ordered remedial measures, citizens may not maintain an action simply because, in their view, the government "has not acted aggressively enough." *Ellis v. Gallatin Steel Co.*, No. 02-6421, __ F.3d ___, 2004 WL 2382166, at *12 (6th Cir. Oct. 26, 2004).

1. Wisconsin's Regulation of MMSD. MMSD provides wastewater treatment services for twenty-eight municipalities in southeast Wisconsin. MMSD collects the wastewater from these municipalities through a system of interceptor sewers, treats it at one of two facilities, and releases the treated water into Lake Michigan. Wisconsin has authorized MMSD's release of water into Lake Michigan through a series of permits issued by the Wisconsin Department of Natural Resources ("WDNR") and approved by the EPA.

This case arises as a result of "overflows" into Lake Michigan and Milwaukee-area rivers. In times of particularly heavy rain, storm water enters MMSD's system. On some occasions, the storm water exceeded sewer capacity and MMSD was required to release some water before treatment in order to avoid sewer backups and the resulting property damage. The WDNR regulates and closely monitors these

overflows, which are permitted in some circumstances. *See* Pet. App. 35a-36a. Extremely heavy rainstorms in 1998 and 1999 caused a number of overflows.

Following these overflows, the WDNR, by January 2000, had begun an in-depth investigation into MMSD's operations. In July 2001, WDNR formally notified MMSD of its conclusion that several of the overflows were violations. Pet. App. 40a. The WDNR informed MMSD that corrective action was required, including significant capacity expansions, upgrades to MMSD's monitoring and modeling systems, and the adoption of rules to require municipalities to reduce storm water infiltration into the system. Although MMSD disputed the WDNR's contention that the overflows violated its permit (*id.* at 41a), MMSD entered into negotiations with the WDNR concerning a potential corrective plan. The WDNR insisted that the corrective plan be both legally binding and approved by a court.

On July 11, 2001, respondents notified MMSD and the State that they intended to sue MMSD for CWA violations based on the overflows.

In August 2001, the WDNR and MMSD, after lengthy negotiations, reached agreement on a long-term corrective plan. Among other things, the resulting plan required MMSD to complete by specified dates three major sewer capacity expansion projects and several other facility improvements. The estimated cost of the projects was over $900 million.

The WDNR formalized the plan in a written stipulation (the "2001 Stipulation") and referred the matter to the Wisconsin Department of Justice ("WDOJ"). The WDOJ, seeking to have the 2001 Stipulation entered as an order, filed it in the Wisconsin Circuit Court for Dane County in an

existing case between the State and MMSD.[1] For procedural reasons, the Dane County judge declined to enter the order.[2]

On the same day the State filed the 2001 Stipulation, MMSD gave a copy of it to respondents. At respondents' request, representatives of WDNR, EPA, and MMSD met with them on December 20, 2001, to discuss the State's compliance plan. At the meeting, the State and respondents agreed not to commence any new legal proceedings before March 15, 2002. In the interim, respondents agreed to provide written comments on the State's compliance plan.

From January through early March 2002, respondents commented on the compliance plan, largely suggesting modifications in the timing of some projects, greater descriptive details, and penalties. Respondents further contended that MMSD should pay their attorneys' fees and costs. During the same period, the EPA also reviewed the compliance plan and provided its comments to the State. Pet. App. 43a-46a (describing EPA's involvement).

2. Respondents and the State Sue MMSD on the Same Day in Separate Courts. On March 15, 2002, both respondents and the State filed new actions against MMSD. At 7:57

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[1] In 1975, MMSD had commenced an action against the State in the Dane County Circuit Court to challenge WDNR's treatment standards for municipal wastewater facilities. The WDNR counterclaimed, alleging that MMSD had violated its permit because of, among other things, overflows. The parties settled that case through a stipulation and order, entered in 1977 by the Dane County Circuit Court, under which MMSD agreed to spend over $2 billion during the subsequent 20 years to construct major system improvements. On ten occasions during 1977-1994, the Dane County Circuit Court entered orders adopting stipulations that modified the original stipulation and order.

[2] On October 19, 2001, the Dane County judge notified the parties that because of the existing case's age, she did not view it as an appropriate vehicle for entering the 2001 Stipulation as a court order. C.A. MMSD S. App. 050-51.

a.m., respondents commenced this action invoking the district court's jurisdiction under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a), as well as under 28 U.S.C. § 1331. Respondents alleged that several overflows between January 1995 and March 2002 were in violation of MMSD's permit and the Act. Respondents requested injunctive relief, civil penalties, and an award of costs and fees.

Later that day, the State sued MMSD in the Wisconsin Circuit Court for Milwaukee County. The State sought forfeitures, penalties, assessments, costs, fees, and injunctive relief for alleged violations during the same period as pleaded in respondents' action. Respondents never attempted to intervene in that case or in the Dane County case.

On May 29, 2002, the State filed in the Milwaukee County Circuit Court a revised stipulation (the "Final Stipulation") that incorporated the EPA's comments on the compliance plan. Pet. App. 44a-46a. This Stipulation resolved all claims relating to alleged permit violations that preceded its date of execution. *Id.* at 54a. Like the 2001 Stipulation filed in Dane County, the Final Stipulation requires MMSD to spend over $900 million to improve its system capacity and to redress overflow violations. *Id.* at 45a. It also provides that the State, in order to obtain structural changes and eliminate prohibited overflows, has chosen to forgo possible monetary sanctions in favor of a binding corrective action program. *Id.*

The Milwaukee County Circuit Court entered a final order approving the Final Stipulation that expressly requires MMSD to "undertake the activities described in the . . . stipulation" and to "comply in all respects with its obligations as set forth in [the] stipulation." Pet. App. 86a.

3. The District Court's Dismissal of Respondents' Suit. After the Milwaukee County Circuit Court entered its order approving the Final Stipulation, MMSD moved to dismiss this citizen action as barred by the State's diligent prosecution

under § 1365(b)(1)(B) and by res judicata. The district court granted MMSD's motion to dismiss on both grounds. Pet. App. 34a-65a.

In assessing diligent prosecution, the district court held that by filing the 2001 Stipulation in the Dane County case, the State had "commenced" a civil enforcement action. *Id.* at 53a. The district court rejected on two grounds respondents' contention that the State's prosecution had not been diligent. First, the district court applied the prevailing principle that "diligence on the part of the enforcement agency is presumed." *Id.* at 49a. Second, the court concluded that the State's compliance plan sufficed to establish diligence. It based this conclusion in part on the fact that "the Final Stipulation expresses the 'intent of the parties' to present 'a comprehensive solution to sanitary sewer overflows, regardless of their cause.'" *Id.* at 54a. The district court further based its conclusion that the State had "diligently prosecut[ed]" on its finding that the Final Stipulation, which was incorporated into the state court's final order, requires substantial modifications to MMSD's systems:

> The Final Stipulation requires significant changes to MMSD's current operating structure at considerable expense. MMSD must complete construction of a 7.4 mile, 20 foot diameter relief sewer on the northwest side of Milwaukee to add 89 million gallons of storage capacity by December 31, 2006, construct two additional sewers adding 27 million gallons of conveyance capacity by December 31, 2009, and complete over 100 treatment plant and interceptor sewer upgrade projects. In addition, MMSD is obligated to finalize its sanitary sewer evaluation study and to require satellite municipalities to achieve a 5% reduction of infiltration and inflow by December 31, 2002.

Id. at 54a-55a.

The district court alternatively held that res judicata barred respondents' claims, which arose out of the same occurrences as those alleged by the State. *Id.* at 55a. Although respondents chose not to participate in the State's enforcement action, the district court concluded that they were necessarily in privity with the State. *Id.* "[I]n situations such as this," the court wrote, "the citizens' action provision of the CWA casts the citizen in the role of a private attorney general, thereby satisfying the privity requirement." *Id.*

4. The Court of Appeals' Decision. The Seventh Circuit reversed, concluding that the State's filing of the 2001 Stipulation in Dane County was a "non-diligent prosecution." Pet. App. 12a.

The Seventh Circuit also rejected the district court's res judicata holding. Although the court agreed that the citizens were litigating the same causes of action, the court held that whether the citizens were in privity with the State required a "detailed examination" of the State's enforcement of the Act. Privity, the court stated, depends on whether the State diligently prosecuted, as that term is used in § 1365(b)(1)(B):

> [I]n order for the state agency to be in privity with the public's interests, the state's subsequently-filed government action must be a diligent prosecution. . . . **We look to the language of the Act to find out what is meant by "diligent prosecution."** Citizens' suits are barred "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State *to require compliance with the standard, limitation, or order.*" 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

Id. at 22a (italics in original, bold added).

Applying this diligent prosecution approach to the privity inquiry, the Seventh Circuit rejected the district court's conclusion that the Final Stipulation's remedial plan demonstrated diligence by the State. *Id.* at 24a, 29a-32a. The

court refused to credit the Stipulation's provision that the parties, including the State, viewed it as "present[ing] a comprehensive solution to sanitary sewer overflows, regardless of their cause . . . [and] resolv[ing MMSD's] potential liability for all alleged sanitary sewer overflows . . ." (Pet. App. at 70a-71a). *See* Pet. App. 24a, 31a. The court's only justification for ignoring these statements is its unexplained aspersion that they are "self-serving." *Id.* at 24a, 31a.

Additionally, the Seventh Circuit, while saying it recognized that the Act requires deference to the State's enforcement decisions, *see id.* at 23a-24a, presumed the opposite—that the state-mandated compliance measures are *not* calculated to ensure compliance. Despite the State's assurance in the Stipulation that the corrective actions it required presented a "comprehensive solution," the court adopted the view that the Final Stipulation's compliance plan is "a stalling tactic rather than a compliance strategy." *Id.* at 32a.

To reach this opinion, the panel relied on misinterpretations of MMSD's statements that the state-ordered projects would "reduce" (rather than "eliminate") overflows and on its perception of "recent events"—*i.e.*, events occurring after the district court dismissed respondents' action. *Id.* at 30a-33a. In forming this perception, the court appears to have looked to irrelevant hearsay—newspaper articles reporting alleged overflows that occurred after the Final Stipulation was executed but before its compliance programs could be completed. *See id.* at 3a n.1, 6a n.3, 27a n.12, 31a n.14. (These articles, which were published after the court of appeals heard oral argument, are not in the record, and the court afforded MMSD neither notice nor an opportunity to respond to their content.)

Concluding that it could not "state with *certainty* . . . whether the [Final] Stipulation is calculated to result in compliance with the Act" (*id.* at 32a (emphasis added)), the Seventh Circuit instructed the district court to determine, after

making a "detailed examination" of the State's compliance program, whether the State met the diligent prosecution standard the Seventh Circuit reads into the Act (*id.* at 33a). The court instructed further that the citizens must be allowed to continue their collateral attack on the State's compliance measures unless the district court concludes that "there is no realistic prospect that violations due to the same underlying causes . . . will continue after the planned improvements are completed." *Id.*

On petitioner's request for rehearing and rehearing en banc, the court of appeals modified its description of the facts but denied rehearing. Pet. App. 63a-64a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision requires federal courts independently to examine the efficacy of a State's chosen compliance measures, even when the State obtains a final state court order commanding those measures. Under the court's application of the diligent prosecution provision, res judicata can only preclude such a suit (alleging the same violations as the government), if the district court makes an independent determination that the government's remedial measures ensure that there is no "realistic prospect" of future violations.

This construction invites citizens unhappy with a State's choice of remedies to ask a federal court for a second opinion on the merits of the State's relief. The decision thus fails to afford final state orders the full faith and credit to which they are entitled under 28 U.S.C. § 1738 and misapplies the diligent prosecution bar on citizen suits in a manner that conflicts with the decisions of other courts of appeals.

This conflict in the construction of the citizen suit provision—a provision common in environmental statutes[3]—is a

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[3] *See* 15 U.S.C. § 2619 (Toxic Substances Control Act); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act); 42 U.S.C. § 7604

matter of substantial importance. The Seventh Circuit's interpretation significantly expands the enforcement role of citizen plaintiffs and federal courts at the expense of government regulatory agencies. In so doing, the Seventh Circuit, unlike the three other courts of appeals discussed below, has failed to heed this Court's warning in *Gwaltney* that allowing citizen plaintiffs to use the federal courts to second-guess government enforcement decisions risks "undermin[ing] the supplementary role envisioned for the citizen suit." 484 U.S. at 60. Indeed, the Seventh Circuit creates the very danger about which *Gwaltney* warned:

> If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

Id. at 61.

Under the Seventh Circuit's approach, no government enforcement is final and authoritative until a federal court takes up the role of environmental protection super-agency and concludes that alleged violations "will be sufficiently ameliorated by the proposed remedial projects." Pet. App. 32a. Besides being inconsistent with the role Congress intended for citizen suits, this construction is inconsistent with this Court's teachings that, when Congress leaves enforcement of broad statutory mandates to government agencies, courts should defer to those agencies' reasonable

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(Clean Air Act); 42 U.S.C. § 11046 (Emergency Planning and Community Right-to-Know Act).

decisions regarding the best manner of ensuring compliance. As this Court stated last Term in an analogous context:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2381 (2004).

Consistent with these teachings, other federal courts, including the First, Sixth, and Eighth Circuits, have held that when a government enforcement agency orders compliance measures, citizen suits have no continuing enforcement role. Had this case arisen in one of those circuits, the State's prosecution would have been presumed "diligent" and would have been preclusive of this citizen action, either by application of res judicata or by application of the Act's diligent prosecution bar.

This Court should grant the petition to resolve this conflict and address these important issues concerning when citizen plaintiffs can wage a collateral attack in federal court against a State's enforcement of the CWA.

I. THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE DILIGENT PROSECUTION BAR TO AUTHORIZE COLLATERAL ATTACKS ON FINAL STATE COURT ORDERS VIOLATES 28 U.S.C. § 1738 AND CONFLICTS WITH DECISIONS OF THE EIGHTH CIRCUIT.

A. The Seventh Circuit's Misuse of the Act's Diligent Prosecution Provision to Limit Application of Res Judicata Fails to Afford the State Court's Final Order the Full Faith and Credit Required by 28 U.S.C. § 1738.

The Seventh Circuit held that the Milwaukee County Circuit Court's order enforcing the Final Stipulation could not preclude respondents' suit unless the stipulation's compliance measures constituted a diligent prosecution under § 1365(b)(1)(B). This holding erroneously extends federal law to limit the effect of a state court order, in violation of the full faith and credit statute. 28 U.S.C. § 1738.

Section 1365(b)(1)(B) does not free citizen suits from the preclusive effects of state court orders. The Sixth Circuit recently made this point: "The 'diligent prosecution' requirement . . . represents a limitation on a citizen's ability to file suit, not a limitation on the effect of subsequent governmental action on a citizen's right to maintain the suit." *Ellis*, 2004 WL 2382166, at *9.

The res judicata effect of final state court orders depends instead on the preclusion law of that State. 28 U.S.C. § 1738 (judicial proceedings of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). The Seventh Circuit recited this principle as if by rote, but it failed to apply it. Instead, the court erroneously held that a state

enforcement agency could only be in privity with citizens suing to enforce the Act if the enforcement agency met the Act's diligent prosecution standard. *See* Pet. App. 22a.

By creating and importing a federal law privity principle, the Seventh Circuit ignored Wisconsin law under which persons with the same legal interests are held, as a matter of law, to be in privity. *See Gerhardt v. Estate of Moore,* 139 Wis. 2d 833, 840-45, 407 N.W.2d 895, 898-900 (1987).[4] Unlike the privity concept the Seventh Circuit created, Wisconsin law holds that one in privity with a party to a final order is bound by that order regardless of the party's diligence in litigating the claim. *See id.* at 843, 407 N.W.2d at 899 (res judicata applied to privy when settlement of prior suit was "not unconscionable," although, "in hindsight, [it may] appear to be inadequate").

Moreover, the Wisconsin Supreme Court has never applied or adopted § 42(1)(e) of the RESTATEMENT (SECOND) OF JUDGMENTS (1982), on which the Seventh Circuit relied for its authorization to graft a federal diligent prosecution analysis onto Wisconsin preclusion law. And, even if Wisconsin would view that section of the Restatement as a persuasive pronouncement of the common law, the Restatement's commentary makes clear that only a showing of "collusion" or "grossly deficient" conduct is sufficient to relieve citizens of judgments entered in actions prosecuted on their behalf. *Id.*, cmt. f. Application of that deferential standard would have required the court of appeals to affirm the district court's conclusion that respondents' action is barred by res judicata.

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[4] *Vacated on other grounds*, 486 U.S. 1050 (1988), *rev'd on other grounds*, 150 Wis. 2d 563, 441 N.W.2d 734 (1989).

B. In Conflict with the Eighth Circuit, the Seventh Circuit Concluded that the Act's Diligent Prosecution Provision Governs Whether Citizens Are in Privity with the Government.

In sharp contradiction to the Seventh Circuit's decision, the Eighth Circuit and other federal courts have concluded that the Act itself puts citizens in privity with government enforcement agencies. Reasoning from this Court's premise that the "central purpose" of the Act's citizen suit provision is to "permit[] citizens to abate pollution when the government cannot or will not command compliance," *Gwaltney*, 484 U.S. at 62, these courts conclude that the Act itself "casts the citizen in the role of private attorney general," *EPA v. City of Green Forest,* 921 F.2d 1394, 1403 (8th Cir. 1990), a role that entails privity with state and federal enforcers.[5]

Applying this principle and recognizing that Congress made citizens only secondary enforcers of the Act, the Eighth Circuit has reasoned that a government consent decree entered in a later-filed enforcement action necessarily precludes citizens from litigating the same alleged violations. In *Green Forest*, the EPA commenced and settled CWA claims that were the subject matter of a separate citizen action. *Id.* at 1400. The Eighth Circuit concluded that the CWA's structure required that it affirm the district court's dismissal of the earlier-filed citizen suit on res judicata grounds:

> In view of the preeminent role that must be afforded the EPA in enforcing CWA violations . . . we hold that it

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[5] *Cf. Citizens Legal Envt'l Network, Inc. v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464, at *11 (W.D. Mo. Feb. 23, 2000) ("Congress itself enumerated the circumstances under which citizens and States are identical parties under the CWA."); Jeffrey G. Miller, *Theme and Variations in Statutory Preclusion Against Successive Environmental Actions by EPA and Citizens*, 28 Harv. Envtl. L. Rev. 401, 423-24 (2004) ("The legislative history of the CWA [citizen suit] provision also anointed a citizen enforcer as a 'private attorney general'").

> was proper for the district court to dismiss [the citizen's] CWA claims against Green Forest after the latter had entered into a consent decree with the EPA. The EPA is charged with enforcing the CWA on behalf of all citizens. Since citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree.

Id. at 1404. Under the Eighth Circuit's interpretation of the CWA, citizens are free to sue only when federal and state governments fail to act:

> The Government, of course, as representative of society as a whole, usually is in the best position to vindicate societal rights and interests. In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void.

Id. at 1405 (quoting *Hudson River Fishermen's Ass'n v. County of Westchester,* 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988)).[6]

In this case, respondents allege generalized harm to their members' enjoyment of Lake Michigan. C.A. S. App. 97-98. Such alleged injuries to Wisconsin's water resources assert violations of public rights—rights for which the State has principal enforcement responsibility. *See R.W. Docks & Slips*

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[6] *See also Ellis*, 2004 WL 2382166, at *10 ("Congress has authorized citizen suits only when environmental officials *fail* to exercise their enforcement responsibility" (internal quote omitted) (emphasis in original)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (citizens' CWA claim barred by State's settlement of "suit to recover damages for injury to a sovereign interest"); *cf. Satsky v. Paramount Communications, Inc.,* 7 F.3d 1464, 1470 (10th Cir. 1993) ("When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.").

v. State, 2001 WI 73, ¶19, 244 Wis. 2d 497, 509, 628 N.W.2d 781, 788 (recognizing that State's title to navigable waters under the public trust doctrine "has been expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes"); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972) (recognizing the "right of the State to sue as parens patriae to prevent or repair harm to its 'quasi-sovereign' interests"); *Georgia v. Tenn. Copper Co.,* 206 U.S. 230, 237 (1907) (describing State's "*quasi*-sovereign" interest "in all the earth and air within its domain" (italics in original)); *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892) (State holds title to the navigable waters of Lake Michigan "in trust for the people of the State").

There is, moreover, no question whether the State took action to enforce the Act in order to protect these public rights. The State investigated the overflows and negotiated a resolution that expressly provides for compliance with MMSD's permit. Indeed, even the Seventh Circuit acknowledged that the State's court-ordered Final Stipulation required MMSD to undertake significant remedial actions.[7] *See* Pet. App. 5a-6a, 23a. Given the primacy accorded government enforcement by the Act, that should be the end of the matter.

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[7] Therefore, this is not a case like *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), in which the State was apparently complicit in the defendant's effort to preclude a citizen suit. *See id.* at 178 n.1. Moreover, the defendant in *Laidlaw* forfeited its res judicata defense in the district court, *see Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 890 F. Supp. 470, 486 n.7 (D.S.C. 1995), and this Court's review was limited to whether the citizens had standing and a justiciable claim; it did not address the potential preclusive effect of the state court order. *See* 528 U.S. at 180-95. *Laidlaw* thus leaves open the questions presented here on which the circuits are in conflict—whether a State's good faith efforts to obtain compliance through court-ordered remedial projects is preclusive, as a result either of res judicata or the Act's diligent prosecution bar, of citizens' efforts to obtain supplanting federal court relief.

Although it would be the end of the matter in the Eighth Circuit, the Seventh Circuit remanded for a "detailed examination" of the court-ordered Final Stipulation. While paying lip service to the need to "giv[e] some deference to the judgment of the State" (Pet. App. 33a), the court instructed the district court to permit the citizens to proceed with litigation designed to second-guess whether over $900 million in capacity expansion and operational upgrades will "sufficiently ameliorate[]" "the systemic inadequacies of MMSD's sewerage facilities." Pet. App. 32a-33a. In so doing, the Seventh Circuit gives respondents free rein to convince the district court to substitute its views (or the Seventh Circuit's fairly clear intimation of what those views should be) for those of government regulators. Thus, on the important issue of whether final orders in government enforcement actions preclude citizen suit litigation of the same alleged violations, the Seventh Circuit's decision is squarely at odds with the Eighth Circuit's *Green Forest* decision. *See also Comfort Lake Ass'n, v. Dresel Contracting, Inc.,* 138 F.3d 351, 356 (8th Cir. 1998) ("Even when an agency enforcement action is not commenced until after the citizen suit, final judgment in the agency's court action will be a res judicata or collateral estoppel bar to the earlier citizen suit."); *Ellis,* 2004 WL 2382166, at *8 ("The touchstone of res judicata effect, however, is the consent decree itself, which resolves all claims 'through the date of entry' of the decree"). *Cf. Supporters to Oppose Pollution, Inc. v. Heritage Group,* 973 F.2d 1320, 1324 (7th Cir. 1992) (Easterbrook, J.) (analogous citizen suit provision of the Resource Conservation and Recovery Act "does not authorize a collateral attack on the agency's strategy or tactics").

II. THE SEVENTH AND SECOND CIRCUITS' INTERPRETATION OF THE DILIGENT PROSECUTION PROVISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

In adopting an interpretation of § 1365(b)(1)(B)'s diligent prosecution provision that requires the district court to second-guess the State's choice of remedy, the Seventh Circuit followed the Second Circuit's decision in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991). There, after citizens sued Kodak for violating the CWA, Kodak settled with the State, agreeing to pay penalties and plead guilty to a state criminal violation in exchange for a release from further criminal liability and penalties. *Id.* at 126. The district court granted Kodak summary judgment in the citizen suit action, but the Second Circuit reversed, reasoning that private enforcement could proceed if there remained "a realistic prospect that the violations alleged . . . will continue." *Id.* at 127.

Both the Second Circuit's *Kodak* decision and the Seventh Circuit's decision below misinterpret the diligent prosecution provision's limitation on citizen suits. The purpose of the diligent prosecution provision is to allow the State to decide—without citizen suit interference—what remedies are in the public's best interest. *See Gwaltney*, 484 U.S. at 60; *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). The provision thus preserves the Congressional preference for enforcement by experienced government agencies by authorizing citizens to litigate only after they give notice of their intent to sue and the State fails to act, not when the State acts and some citizens believe it should do more.

Recognizing this Congressional preference, other courts of appeals presume that whenever the State procures affirmative relief through litigation its prosecution is "diligent." The most recent example of this conflicting statutory interpre-

tation is the Sixth Circuit's decision in *Ellis*. There, citizens commenced an action against a steel manufacturer and a slag processor under the citizen suit provision of the Clean Air Act ("CAA") (a provision that in all material respects is the same as § 1365). 2004 WL 2382166, at *3. Over a year after the citizens commenced their suit, the EPA, which had earlier begun an action to enforce the CAA against the same parties, amended its complaint to add claims overlapping the citizens' claims and filed proposed consent decrees resolving those claims. *Id.* Like the Final Stipulation here, the consent decrees in *Ellis* required the defendants to undertake a variety of compliance measures to reduce the emission of pollutants. *Id.* at *11. Also like the Final Stipulation here, the consent decrees in *Ellis* "specifically contemplated some time for implementing their terms." *Id.*

The district court in *Ellis* both approved the government's consent decrees and granted the citizens' request for injunctive relief, which, among other things, required increased emission monitoring beyond that called for by the government. *Id.* at *10. In defending this award of relief on appeal, the *Ellis* citizens, like the Seventh Circuit below, relied on the Second Circuit's holding in *Kodak* that "citizen plaintiffs may maintain their lawsuits after the Government has resolved claims regarding earlier violations when there is a 'realistic prospect' of the alleged violations continuing." *Id.* at *13. The Sixth Circuit disagreed.

Rejecting the principle that citizen suits may continue after government enforcement, the Sixth Circuit stated, "[g]enerally speaking, when the contours of a private plaintiff's suit and the Government's suit coincide . . . the former must be dismissed." *Id.* at *11. The court also rejected the Second (and now the Seventh) Circuit's approach of requiring an inquiry into the effectiveness of the government's remedy. Fidelity to the Act's distribution of enforcement authority, the court reasoned, requires that government decrees affording

prospective relief be "allowed to work" before being subjected to challenge by citizens. *See id.* at *13.

As the Sixth Circuit explained, once a government agency enforces environmental laws against an alleged violator, the structure and purposes of those laws require a moratorium on further citizen litigation of the same violations in order to allow time for the alleged violator to carry out the government's remedial directives. *See id.* at *11-12. If a citizen then reasonably believes that the government's remedies are proving inadequate, it must give a new notice of intent to sue based on the post-consent decree violations. *Id.* This construction is consistent with the Act's structure and purposes because it affords the defendant an opportunity to address any claimed inadequacies before having to defend additional litigation. *Id.*

The Seventh Circuit's decision, in contrast, provides MMSD no similar opportunity. Instead, MMSD must litigate immediately whether the compliance measures the State has directed it to implement will "sufficiently ameliorate[]" "the systemic inadequacies of MMSD's sewerage facilities." Pet. App. 32a-33a.

The Sixth Circuit is not alone in prohibiting what the Seventh Circuit here allows. The First Circuit similarly prohibited citizens from collaterally attacking the effectiveness of government remedies in *North & South Rivers Watershed Association v. Town of Scituate,* 949 F.2d 552, 557 (1st Cir. 1992). There, to resolve a claim that the town of Scituate was violating the CWA by releasing unpermitted wastewater, the Massachusetts Department of Environmental Protection issued an order requiring the town to "(1) immediately prohibit any new connections to its sewer system; (2) take all steps necessary to plan, develop and construct new wastewater treatment facilities; and (3) begin extensive upgrading of the facility subject to [the Department's] review and approval at interim stages . . . ."

Id. at 553-54. Two years later, citizens sued the town, alleging violations of the Act based on the same discharges that formed the basis for the State's order. *Id.* at 554. The citizens argued that they were entitled to demonstrate that the State had not done enough to enforce the order and that its action constituted "diligent *non*-prosecution."[8] *Id.* at 557 (emphasis added) (internal quotation omitted).

In affirming the district court's dismissal, the First Circuit reasoned that, because government enforcement enjoyed statutory primacy, the State's order, which addressed the very violations at issue, was entitled to great deference: "Where an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *Id.* Given this deferential treatment, the First Circuit had little difficulty concluding that the order "represents a substantial, considered and ongoing response to the violation, and that the [Department's] enforcement action does in fact represent diligent prosecution." *Id.*

Following the First Circuit, the Eighth Circuit in *Arkansas Wildlife Federation*, 29 F.3d 376, also held that a consent order issued by a government enforcement agency bars a citizen suit based on the same alleged CWA violations.[9] The citizens in *Arkansas Wildlife* attempted a collateral attack on the State's choice of remedies, contending that the State's prosecution was not diligent because it had "failed to address [defendant] ICI's violations, gave ICI repeated extensions for compliance, and assessed insignificant amounts of civil

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[8] Like state civil or criminal actions, state administrative actions are preclusive of citizen suits if they are "diligently prosecuted." *See* 33 U.S.C. § 1319(g)(6)(A).

[9] Like *North & South Rivers*, *Arkansas Wildlife* addressed whether a State's administrative action was diligently prosecuted under § 1319(g)(6)(A).

penalties . . . ." *Id.* at 380. In affirming the district court's dismissal of the citizens' suit, the Eighth Circuit (like the First and Sixth Circuits) recognized that citizen suits "are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility, and that such suits should not considerably curtail the governing agency's discretion to act in the public interest." *Id.* "It would be unreasonable and inappropriate," the court concluded, "to find failure to diligently prosecute simply because ICI prevailed in some fashion or because a compromise was reached." *Id.*

The conflict among these circuits' construction of the citizen suit provision is plain. The First, Sixth, and Eighth Circuits hold that citizen suits must stop once a government enforcement agency prosecutes the alleged violations and requires a defendant to perform remedial measures. The Second and Seventh Circuits, on the other hand, allow citizen suits to proceed under those circumstances unless a district court independently determines that the relief obtained by the government will ensure that there will be no continuing violations. This latter approach affords far less deference to enforcement agencies, instead requiring the district court to function as a sewerage engineer and predict the probable effect of billion dollar sewer construction projects. District courts are ill equipped to make these types of predictions. *Cf. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("When reviewing this kind of scientific determination . . . a reviewing court must generally be at its most deferential").

Moreover, under the Seventh Circuit's interpretation of the Act, citizen plaintiffs, like respondents, may choose to eschew intervention in the government's enforcement proceedings in favor of asking a federal court to make an after-the-fact review of the government's choice of remedial measures. The Seventh Circuit has thus construed the Act to

provide citizen plaintiffs exactly the intrusive role in government enforcement that this Court has held inconsistent with Congress's intent and the Act's structure and purpose. *See Gwaltney*, 484 U.S. at 60-61.

One thing is clear. Had the court below applied the deferential approach taken by *Ellis*, *North & South Rivers* and *Arkansas Wildlife* to determine whether the State's prosecution was diligent, it would have affirmed. As in those cases, the record leaves no doubt that the order incorporating the Final Stipulation requires MMSD to adopt a substantial compliance program. It cannot be said, and the Seventh Circuit did not say, that the State "failed to take action." Thus, under the First, Sixth, and Eighth Circuits' construction of the Act, the State's final court order would bar respondents from continuing to litigate claims the State resolved.[10]

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[10] Many lower federal courts have also reasoned that the Act requires deference to government agencies' efforts to enforce the Act and presume the diligence of those agencies in prosecuting violations. *See, e.g., Clean Air Council v. Sunoco, Inc.*, No. 02-1553 GMS, 2003 WL 1785879, at *5-6 (D. Del. Apr. 2, 2003) (a citizen suit is barred unless the government's action is "totally unsatisfactory"); *Cmty. of Cambridge Envt'l Health & Cmty. Dev. Group v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000) ("Most courts considering the diligence of a state or federal prosecution have exhibited substantial deference for the agency's process."); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997) (the CWA calls for a deferential approach that does not "circumscribe" the enforcement agency's ability to implement its expert judgment on corrective measures); *Sierra Club v. Colo. Ref. Co.*, 852 F. Supp. 1476, 1483 (D. Colo. 1994) (affording deference to the State's plan of attack); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 183 (D. Conn. 1991) ("The court must presume the diligence of the state's prosecution absent persuasive testimony that the state has engaged in a pattern of conduct in its prosecution that could otherwise be considered dilatory, collusive or otherwise in bad faith.") (internal quotation marks omitted) (quoting *Connecticut Fund for Env't v. Contract Plating Co.*, 631 F. Supp. 1291,

* * *

The Seventh Circuit has allowed respondents to wage a collateral attack on state-ordered remedial projects based on nothing more than "concerns" that those "remedial projects [might] . . . turn out to be too little, too late" (Pet. App. 32a n.15). The decision thereby leaves practically all state-mandated remedial orders open to annulment by federal courts acting at the request of citizen plaintiffs who choose to sit out state court proceedings. This expansion of the citizens' role interferes with government enforcement of the Act, improperly assigns to federal courts the task of environmental policymaking, and conflicts with decisions of the First, Sixth, and Eighth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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1293 (D. Conn. 1986), *aff'd in part, rev'd in part,* 989 F.2d 1305 (2d Cir. 1993)).

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-3809

FRIENDS OF MILWAUKEE'S RIVERS and
LAKE MICHIGAN FEDERATION,
Plaintiffs-Appellants,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
Defendant-Appellee.

March 29, 2004, Argued
September 2, 2004, Decided

OPINION

Before CUDAHY, ROVNER and DIANE P. WOOD, *Circuit Judges*.

CUDAHY, *Circuit Judge*. For decades, the defendant Milwaukee Metropolitan Sewerage District (MMSD) and its predecessor organization have, for various reasons, occasionally discharged untreated sewage directly into Lake Michigan and Milwaukee's rivers. The discharges were reduced in number and volume after MMSD's system's capacity was expanded by the Deep Tunnel, which was completed in 1994. However, discharges from sanitary sewers (which violate the *Clean Water Act* and MMSD's discharge permit) have persisted despite expectations that the Deep Tunnel would virtually eliminate them.

The plaintiffs, Friends of Milwaukee's Rivers and the Lake Michigan Federation (collectively, the plaintiffs), perceived a

lack of action by the State of Wisconsin and MMSD to eliminate these persistent sanitary sewer discharges. In 2001, the plaintiffs filed a notice of intent to bring a citizens' suit under the *Federal Water Pollution Control Act* (the Clean Water Act or the Act), 33 U.S.C. §§ 1251 *et seq.*, and in the early hours of March 15, 2002, they brought suit in federal court. The State of Wisconsin also filed suit later on the same day in Milwaukee County court, and within a few months, it reached a settlement with MMSD. The centerpiece of the consent agreement resulting from the Milwaukee County action provided, for additional expenditures of more than $ 900 million on several projects to further increase the capacity of MMSD's sewer system.

MMSD subsequently moved to dismiss the plaintiffs' federal suit as barred because the State of Wisconsin had taken judicial and administrative enforcement actions to diligently prosecute its violations of the Act. The district court, finding that the State of Wisconsin had indeed diligently prosecuted the violations alleged by the plaintiffs, dismissed for lack of subject matter jurisdiction because the suit was barred by the terms of the Clean Water Act. In the alternative, the district court found that the plaintiffs' suit would be barred by res judicata. The plaintiffs appeal both of these findings, and for the reasons that follow, we reverse.

I. Background

MMSD is a state-chartered government agency providing wastewater services to 28 municipalities in southeast Wisconsin. MMSD's 420-square-mile service area includes all cities and villages within Milwaukee County (except the City of South Milwaukee), and all or part of 10 municipalities or sanitary districts in the surrounding counties of Ozaukee, Washington, Waukesha and Racine. Two types of municipality-owned sewer systems feed into MMSD's interceptor sewers: separate sewers and combined sewers. Separate sewers have separate pipes for storm water (which empties

directly into area waterways) and sanitary waste (which empties into MMSD's system where it can be treated). Combined sewers, which are mostly older sewer systems, are designed to carry both storm water and sanitary waste in the same pipes.[1] MMSD's discharge permit prohibits overflows from separate sanitary sewers except in very limited situations, though up to six discharge events are allowed annually from combined sewers as long as Lake Michigan's water quality does not suffer. (MMSD's Supp. Appx. at 142.)

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[1] There are advantages and disadvantages to combined sewer systems. The disadvantages were dramatically illustrated during the month of May 2004, when heavy rainfall resulted in the dumping of "an unprecedented 4.6 *billion* gallons of raw sewage" directly into Lake Michigan and Milwaukee area streams and rivers. Marie Rohde and Steve Schultze, *Sewage Dumped in May: 4.6 Billion Gallons*, MILWAUKEE J. SENTINEL, May 29, 2004, at 1A (emphasis added). The State accused MMSD of multiple violations for the portion of the 4.6 billion gallons attributable to separated sewers carrying only sanitary waste, which accounted for 500 million gallons. *See* Steve Schultze and Marie Rohde, *Sewerage District Denies Blame,* MILWAUKEE J. SENTINEL, July 3, 2004, at 1B. The remaining 4.1 billion gallons were attributable to discharges from combined sewer systems. Wisconsin's Department of Natural Resources has recently referred MMSD (along with 29 southeastern Wisconsin communities) to Wisconsin's Department of Justice for possible civil litigation. *See* Larry Sandier, *DNR Calls for Legal Action in MMSD Dumps,* MILWAUKEE J. SENTINEL, August 3, 2004, at 1B.

The advantages of combined sewer systems may be less obvious but should still be mentioned. In MMSD's combined sewer system, the often highly-contaminated runoff from most rainstorms and snowstorms is captured in the system and treated before being discharged. This allows Lake Michigan to be spared from "vast amounts of road salt, heavy metals, oil and grease" in all but the heaviest storms. George Meyer, *Separating Sewers Won't Do the Job,* MILWAUKEE J. SENTINEL, June 20, 2004, at 3J. Discharges from combined sewers are also diluted with storm water, which is estimated by WisDNR to make up 90% of overflows, while discharges from separated sewers involve undiluted sewage. *See id.;* Lee Bergquist, *Lake Can Take Some Pollution, But Experts Still Worry About Overflows, Runoff,* MILWAUKEE J. SENTINEL, July 12, 2004, at 1A.

Nearly thirty years ago, the State of Wisconsin (State)[2] entered into a stipulation (1977 Stipulation) with the predecessor organization of the defendant, MMSD. This stipulation resolved litigation that had commenced in 1976 in the Dane County Circuit Court over violations of MMSD's Wisconsin Pollutant Discharge Elimination System (WPDES) permit. The 1977 Stipulation acknowledged more than 60 historic violations of MMSD's WPDES permit and the Federal Water Pollution Control Act (the Clean Water Act or the Act), 33 U.S.C. §§ 1251 *et seq.*, but it did not require MMSD to pay any penalties or fines. Instead, MMSD was required to spend nearly $2 billion over the following 20 years on improvements to several woefully substandard aspects of MMSD's sewage treatment system. The main improvement was a "Deep Tunnel," which came on line in 1994. The Deep Tunnel increased the system's capacity by allowing up to 405 million gallons of untreated sewage to be temporarily stored during periods of heavy rain and then pumped back into MMSD's treatment facilities and treated before being discharged. Heavy rainfall taxes the system's capacity due to Milwaukee's combined sewers as well as improperly connected downspouts/drainage and leaks in the system that allow runoff and ground water to infiltrate.

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[2] Wisconsin has a "stepped" enforcement process that begins with meetings between the Department of Natural Resources (WisDNR) and the violator or with the issuance of a warning letter (Notice of Non-Compliance). (Plaintiffs' Supp. Appx. at 278.) If the conditions causing the violation are not resolved, WisDNR can issue a formal notice of violation. *Id.* If the violator does not take corrective action, WisDNR refers the matter to the Wisconsin Department of Justice (WisDOJ) to initiate judicial action with which WisDNR remains involved. (MMSD's Br. at 39.) For ease of reference, when discussing judicial and administrative actions taken by Wisconsin state agencies against entities that violate the Act, we will refer to the Wisconsin Department of Natural Resources (WisDNR), the Wisconsin Attorney General and the Wisconsin Department of Justice (WisDOJ) generically as "the State." In other contexts and as necessary, the agencies will be referred to individually.

Although the Deep Tunnel undeniably has reduced the number and volume of both sanitary sewer overflows (SSOs) and combined sewer overflows (CSOs), it has not fulfilled its intended goal of virtually eliminating SSOs. (Plaintiffs' Sep. Appx. at 211.) Contrary to expectations, there have been an average of 4.9 SSOs and 3.0 CSOs annually since the Deep Tunnel went into effect (some of which were not related to the Deep Tunnel), resulting in discharges by MMSD totaling 936.7 million gallons and 12.3 billion gallons respectively since 1994 (as of a 2002 audit). *Id.* at 212.

The plaintiffs grew concerned about these continuing discharges and the State's apparent lack of enforcement action. On July 11, 2001, they sent to MMSD the required notice of intent to bring a citizens' suit under the Clean Water Act for violations of MMSD's discharge permit that had occurred after the Deep Tunnel came on line, with copies to all necessary state and federal agencies. (Plaintiffs' Sep. Appx. at 105-09.) Five days later, the State notified MMSD that several of the SSOs identified in the plaintiffs' letter were violations of MMSD's WPDES permit and the Act. One day prior to the expiration of the 60-day notice period prescribed by the Act, the State and MMSD filed a stipulation (2001 Stipulation) with the Dane County Circuit Court as part of the 1976 litigation. Neither the plaintiffs nor the public were provided any opportunity to comment on the 2001 Stipulation prior to its filing. The 2001 Stipulation required MMSD, at an estimated total cost of $ 907 million, to complete three new deep tunnel projects (increasing storage capacity by an additional 116 million gallons, or 30%), to complete all activities contemplated by the approved 2010 Facilities Plan by various fixed dates, to complete planning for the 2020 Facilities Plan by a fixed date and to complete and implement a Capacity, Management, Operation and Maintenance

(CMOM) self-auditing program.[3] (MMSD's Br. at 13.) However, the Dane County judge refused to approve the 2001 Stipulation, saying, "It does seem to me that at some point a court's involvement in a case must end. It also seems to me that this case has gone well beyond that point." (Plaintiffs' Short Appx. at 9.[4])

Subsequently, the State and MMSD agreed to meet with the plaintiffs to discuss their concerns about the proposed 2001 Stipulation. The State agreed, at the plaintiffs' request, to hold off filing suit against MMSD until March 15, 2002, while settlement negotiations took place. (MMSD's Br. at 14.) However, the agreement failed to include a provision that the State be allowed to file first on that date. After the negotiations failed, the plaintiffs filed their suit at 7:57 a.m. on March 15, 2002 in the Eastern District of Wisconsin, alleging 165 SSOs from various locations during the period from January 1, 1995 to September 25, 2001. Later that same day, the State filed suit in Milwaukee County Circuit Court, counting the same 165 SSOs as 13 SSO events in accordance with the terms of MMSD's permit and finding eight of the 13 to be violations of MMSD's permit and three to require additional investigation. (MMSD's Br. at 15 n.6; PSA at 7.) The plaintiffs, under Wisconsin law, could have requested to intervene in the State's suit but did not do so. *Wis. Stat.* § 803.09.

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[3] MMSD notes that the Environmental Protection Agency acknowledges that "even municipal collection systems operated in an exemplary fashion may experience unauthorized discharges under exceptional circumstances." (MMSD's Br. at 10 n.4.) Also, the EPA recently advocated reduction or elimination of penalties for municipalities that adopted the CMOM program. *Id.* However, the Milwaukee Journal Sentinel recently reported that a top EPA official characterized MMSD as "the worst dumper on Lake Michigan and among the worst on the Great Lakes." Schultze and Rohde, *supra* note 2, at lB.

[4] For ease of reference, citations to the Plaintiffs' Short Appendix will be designated by "PSA at __."

On May 29, 2002, while the plaintiffs' suit was pending, the Milwaukee County Circuit Court, at the request of the State and MMSD, entered a stipulation (2002 Stipulation) that settled the State's lawsuit. The 2002 Stipulation was "substantially the same" as the 2001 Stipulation: although the compliance schedule had been compressed, the scope of the work remained the same. (MMSD's Br. at 16.) The plaintiffs have several problems with the 2002 Stipulation, the main problem apparently being the lack of any penalties for past violations or provisions for penalties in the event of future violations, though other flaws are mentioned. (*See, e.g.*, Plaintiffs' Br. at 13-14, 32; MMSD's Supp. Appx. at 87-95.) The 2002 Stipulation, like the 2001 Stipulation, requires MMSD to undertake various improvement projects which will cost taxpayers $ 907,000 through 2010. It also rescinded the 2001 Stipulation that the State and MMSD had previously filed.

Shortly thereafter, MMSD moved to dismiss the plaintiffs' complaint. An Audit Report subsequently released by the Wisconsin Legislative Audit Bureau (2002 Audit Report) (Plaintiffs' Sep. Appx. at 205-301) highlighted several factors contributing to MMSD's continuing CSOs and SSOs, including large storms in recent years; capacity issues in the Deep Tunnel and MMSD's sewers and treatment facilities; and operational policies that have exacerbated overflows. *Id.* at 231. But the district court nonetheless found that the State had commenced and diligently prosecuted judicial and administrative actions against MMSD, resulting in a lack of subject matter jurisdiction that barred the plaintiffs' citizens suit from proceeding. In the alternative, the district court found that *res judicata* would bar the litigation. The plaintiffs now appeal both of these findings.

II. Discussion

The plaintiffs brought this suit seeking a declaratory judgment, injunctive relief, civil penalties and costs and fees

under the citizens' suit provision of the Clean Water Act. The district court had federal question jurisdiction pursuant to § 505(a) of the Act. 33 U.S.C. § 1365(a); 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291 because the district court entered a final judgment dismissing this case due to a lack of subject matter jurisdiction.

We review de novo the district court's dismissal of the plaintiffs' suit for lack of subject matter jurisdiction. *Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001). In considering a motion to dismiss for lack of subject matter jurisdiction, we must accept the complaint's well-pleaded factual allegations as true and must draw all reasonable inferences from those allegations in plaintiffs' favor as the non-moving party. *Id.* We also employ the de novo standard in reviewing the dismissal of an action on res judicata grounds. *4901 Corp. v. Town of Cicero*, 220 F.3d 522, 527 (7th Cir. 1999).

The Clean Water Act provides that "any citizen may commence a civil action on his own behalf-(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this [Act]." 33 U.S.C. § 1365(a). Pursuant to the Act, no action may be brought "prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order." *Id.* at § 1365(b)(1)(A). Citizens are also barred from bringing suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." *Id.* at § 1365(b)(1)(B). In addition, any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to" the subsection of the Act addressing administrative actions "shall not be the subject of a civil penalty action." 33 U.S.C.

§ 1319(g)(6)(A). However, this limitation is inapplicable to a citizens' suit that is filed before the State commences administrative action. *Id.* at § 1319(g)(6)(B).

Here, the plaintiffs gave the required written notice to MMSD, to the United States Environmental Protection Agency (United States EPA) and to the State of its intent to sue, and the plaintiffs' complaint was filed more than 60 days after notice was given. Whether the State had "commenced and [was] diligently prosecuting a civil...action" or administrative action at the time the plaintiffs filed suit, and if not, whether res judicata nonetheless bars the plaintiffs' suit, are the issues we must resolve.

A. Did WisDNR timely commence and diligently prosecute a civil or administrative action?

In determining whether the plaintiffs' suit was barred under § 1365(b)(1)(B), the district court discussed three of the State's judicial actions: the 1977 Stipulation (which arose out of the 1976 litigation and addressed earlier violations); the 2001 Stipulation (which was filed as an attempted continuation of the 1976 litigation to address the violations alleged by the plaintiffs but was not accepted by the Dane County court and was later rescinded by the 2002 Stipulation); and the 2002 Stipulation (which ended litigation that had been filed in Milwaukee County court later on the same day that the plaintiffs filed suit in district court). The district court also examined whether administrative actions undertaken by the State barred the plaintiffs' suit for civil penalties under § 1319(g). We will consider in turn each of these four hurdles facing the plaintiffs.

1. The 1976 litigation and 1977 Stipulation

No one disputes (or could dispute) that the 1976 litigation in Dane County and the resulting 1977 Stipulation occurred or were commenced before the plaintiffs' suit was filed

nearly 25 years later. However, whether these actions also qualify as a diligent prosecution of violations that occurred after all work contemplated under the 1977 Stipulation had been completed is another matter. The plaintiffs argue that the 1977 Stipulation was over and done with by 1996 at the latest. But even if we assume that the 1976 action were still "open" to receive the filing of the 2001 Stipulation, the 1977 Stipulation could not qualify as a diligent prosecution of the violations alleged by the plaintiffs since the projects mandated by the 1977 Stipulation obviously did not prevent those violations from occurring.

Whether the 1976 litigation and 1977 Stipulation constituted a diligent prosecution of the historical violations that had occurred prior to the 1976 litigation and the contemplated violations that were going to continue to occur until work was completed under the 1977 Stipulation is not at issue here. Logically, however, the 1976 litigation and 1977 Stipulation cannot constitute diligent prosecution of violations that have occurred (or continued to occur) after all work under the 1977 Stipulation had been completed. If the violations alleged by the plaintiffs occurred because of lingering problems that the 1977 Stipulation failed to resolve, the 1977 Stipulation cannot have been a diligent prosecution of the circumstances causing those violations. If, on the other hand, the violations alleged by the plaintiffs occurred because of circumstances unrelated to those that the 1977 Stipulation was intended to comprehensively address, then the 1976 action cannot possibly have been a diligent prosecution of violations due to circumstances unknown and unlitigated at that time. Either way, the 1976 litigation and 1977 Stipulation do not amount to diligent prosecution of the violations alleged by the plaintiffs.

2. The 2001 Stipulation

The 2001 Stipulation was filed as part of the 1976 litigation in Dane County Circuit Court *before* the 60-day notice period had expired and *before* the plaintiffs filed their suit. But the

Dane County judge refused to enter the 2001 Stipulation, and the parties later rescinded it by the 2002 Stipulation, which was entered as part of a separate action instituted in Milwaukee County Circuit Court. The district court concluded that the Dane County court had retained jurisdiction over the 1977 Stipulation and that the 2001 Stipulation was a diligently prosecuted continuation of the same action. The plaintiffs argue that the Dane County court lacked continuing jurisdiction because all work contemplated under the 1977 Stipulation was long completed and that the flaws in the 2001 Stipulation render it non-diligent.

With respect to the timeliness of the action, if the State had chosen to file a brand new *lawsuit* rather than a new consent order in a very old lawsuit, that lawsuit would have been timely commenced. And if the Dane County judge had approved the 2001 Stipulation after it was filed, the 2001 Stipulation would also have been a timely commenced judicial enforcement action. The fact that the 2001 Stipulation was never approved by the court and was later rescinded does not affect its *timeliness,* which is determined by the date of filing.[5] *Connecticut Fund for the Environment, Inc. v.*

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[5] For the purposes of deciding whether the 2001 Stipulation was a timely commenced action, under circumstances such as these, we are reluctant to use the initiation of an older judicial action to back-date the commencement of an action under the Clean Water Act as suggested by MMSD. (MMSD's Br. at 27-28.) If a state agency were allowed to indefinitely continue an enforcement action so as to ensure that it always has on the back burner a court action that has been "commenced" before any later citizens' suit could be filed, that arrangement would eviscerate the timely commencement requirement because the agency could wait as long as it liked before responding to any citizens' suit. Using the earlier commencement date might also indicate a lack of diligence in resolving problems known about for years. *See New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 168 (S.D.N.Y. 1991) (finding that prosecution was not diligent where orders were amended to extend deadlines and a target completion date of 1995 was "simply too long to rectify a problem that has been known about

Upjohn Co., 660 F. Supp. 1397, 1404 (D. Conn. 1987) ("The court must apply an inflexible rule which determines jurisdiction from the time of filing the complaint."). But the court's non-approval *does* render the 2001 action a non-diligent prosecution.[6] Even though the 2001 Stipulation may have been *intended* to address "dry and wet weather overflows, and mandate[] three extensions to the Deep Tunnel" (PSA at 19), the fact that the Dane County judge refused to enter the 2001 Stipulation (whether on a jurisdictional basis or otherwise) robbed that Stipulation of any legally binding effect. Even if the 2001 Stipulation had bound the parties, it was rescinded a few months later by the 2002 Stipulation, which resolved a separate judicial action filed in a different court. The fact that the 2002 Stipulation was very similar to the 2001 Stipulation does not equip the 2001 Stipulation with the teeth required to qualify on its own as a diligent prosecution. A judicial action that never resulted in any legally binding agreement to resolve the violations alleged by the plaintiffs (and was rescinded before MMSD took any actions toward complying with it) is not a diligent prosecution.

3. The 2002 litigation and 2002 Stipulation

The plaintiffs argue that a timely commenced action must be filed prior to a citizens' suit in order for it to have potentially preclusive effect under the Act. Since the plaintiffs filed their suit several hours before the state's suit was filed, they argue that the State's 2002 litigation was not timely commenced. MMSD counters that the State agreed to postpone filing its complaint until March 15, 2002 at the plaintiffs' request, in order to give the parties a chance to

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since 1983"). Here, the 2001 Stipulation was filed before the 60-day window expired or a citizens' suit was filed and was therefore timely.

[6] It is also troubling that the 2001 Stipulation was filed without opportunity for notice and comment by the public, including the plaintiffs.

negotiate a satisfactory resolution. The parties did not incorporate into their agreement to postpone filing their lawsuits any provision governing which party would be considered to have filed first. The district court did not weigh in on this issue, finding that the State's 2002 suit was filed several hours after the plaintiffs' suit, and apparently concluding that it could not qualify as a timely commenced judicial action. (PSA at 21.)

We are relieved to note that races to the courthouse to file Clean Water Act complaints, such as the one which took place here, are rare, though the caselaw relating to such situations is correspondingly sparse. When there has been an agreement between the parties that the citizens would file first, the citizens' suit has been held not to be barred by a suit filed by the state agency later the same day. *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 207-08 (4th Cir. 1985). Similarly, where the state agency had asked the citizens to postpone filing their suit, the earlier-filed citizens' suit was not barred. *Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Prot.*, 27 F. Supp. 2d 380, 382-83 (E.D.N.Y. 1998). MMSD argues that these cases are inapposite here because the State postponed filing its suit at the plaintiffs' request and not the other way around. However, these decisions (and others) arrived at their holdings by employing a literal, inflexible interpretation compelled by the clear and unambiguous language of the Act. *See Chesapeake Bay Found.*, 769 F.2d at 208 ('This latter statutory bar is an exception to the jurisdiction granted in subsection (a) of § 1365 and jurisdiction is normally determined as of the time of the filing of a complaint. Moreover, the verb tenses used in subsection (b)(1)(B) and the scheme of the statute demonstrate that the bar was not intended to apply unless the government files suit first (and is diligently prosecuting such suit)."); *Long Island Soundkeeper Fund*, 27 F. Supp. 2d at 383 ("The language of this statute 'clearly contemplates action prior to the filing of a citizen suit.'") (internal citation

omitted); *Connecticut Fund for the Env't*, 660 F. Supp. at 1404 ("The court must apply an inflexible rule which determines jurisdiction from the time of filing the complaint."). We are not inclined to add our encouragement to a race to the courthouse. Nor do we wish to discourage state agencies from attempting to resolve disputes through negotiation with citizens' groups. But the clear and unambiguous language of § 1365(b)(1)(B) and its uniform interpretation by the courts on a jurisdictional point dictate a conclusion that the State's 2002 litigation (and resulting 2002 Stipulation) cannot qualify as a timely commenced action barring the plaintiffs' suit.[7]

Any similarity of the 2002 Stipulation to an ineffective stipulation that was timely filed in a different suit in a different court (i.e., the 2001 Stipulation) does not alter the outcome. Thus, we find that the State's judicial action resulting in the 2002 Stipulation was commenced when the Milwaukee County suit was filed after the plaintiffs' suit was filed on March 15, 2002, not when the 2001 Stipulation was filed (or earlier). Any other conclusion would allow state agencies to file "placeholder" lawsuits or consent decrees to ensure timely commencement and then to grapple with the problem at their (relative) leisure, subject only to the diligent prosecution requirement (which, as the district court noted, is a deferential standard). Since the Milwaukee County action does not meet the timely commencement requirement, it cannot bar the plaintiffs' citizens' suit under § 1365(b)(1)(B), whether it is diligent or not. We will address the question whether the 2002 Stipulation represents a diligent prosecution of the violations alleged by the plaintiffs later, in our discussion of res judicata.

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[7] We note that the State could have avoided this outcome by incorporating a "first to file" provision into its agreement with the plaintiffs to postpone filing any suit until March 15, 2002.

4. WisDNR's administrative actions

As the Eleventh Circuit has recently noted,

> [c]ourts that have addressed § 1319(g)(6)(A)(ii)—the "diligent-prosecution bar"—have interpreted the statute to bar citizen suits when three requirements are satisfied. First, the state must have "commenced" an enforcement procedure against the polluter. Second, the state must be "diligently prosecuting" the enforcement proceedings. Finally, the state's statutory enforcement scheme must be "comparable" to the federal scheme promulgated in 33 U.S.C. § 1319(g).

McAbee v. City of Fort Payne, 318 F.3d 1248, 1251 (11th Cir. 2003). In finding that the State's administrative enforcement actions barred the plaintiffs' suit under § 1319(g), the district court here referred to such actions as meetings between the EPA and WisDNR, between WisDNR and MMSD and between all three entities (PSA at 5, 6); information requests by WisDNR that MMSD had to comply with (PSA at 6); projects outlined by WisDNR for MMSD to "focus on initially" (PSA at 7); investigation of overflow events between February and July 2001 (*id.*); the issuance of an informal notice of non-compliance to MMSD shortly after the plaintiffs' notice of intent to sue was received *(id.; see also* Plaintiffs' Br. at 33-34 (noting that until the State filed its suit on March 15, 2002, it had never escalated its "stepped" enforcement policy beyond the first level, which is the issuance of an informal notice of non-compliance)); meetings between MMSD and WisDNR in August 2001 "to negotiate a corrective action plan" (PSA at 8); and the "formal referral of the matter" to WisDOJ, which subsequently filed the 2001 Stipulation in Dane County court (PSA at 8-9). Although these actions undeniably resulted in the eventual filing of the Milwaukee County action and the 2002 Stipulation, they

do not themselves qualify as the commencement of an administrative enforcement action that would serve to bar the plaintiffs' suit.

"Commencement" with respect to an administrative action is not defined by the Act, and we have not previously had the opportunity to weigh in on this issue. Other courts have found that the filing of an administrative consent order prior to the filing of a citizens' suit would in most cases qualify as the sort of administrative action that would bar a citizens' suit for civil penalties.[8] But if the consent order comes after the citizens' suit is filed, the citizens' suit may proceed. *See Altamaha Riverkeepers v. City of Cochran 162* F. Supp. 2d 1368, 1373 (M.D. Ga. 2001) (finding that proposed consent order and fines that came after citizens' suit was filed did not bar suit). The Eighth Circuit has implied that issuance of a formal Notice of Violation could also qualify as the commencement of an administrative enforcement action if it triggers notice and hearing procedures designed to protect and give access to the public and interested parties. *Cf. Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 379-80. Letters and conferences where no public notice was given and that did not result in hearings have been found not to bar a citizens' suit. *See Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Co.*, 734 F. Supp. 667, 669-70 (M.D. Pa. 1989) (finding state environmental department's unsigned

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[8] *See McAbee*, 318 F.3d at 1251 n.6 ("[M]ost courts that have addressed the issue have concluded that issuance of an administrative consent order . . . would satisfy the 'commencement' requirement."); *Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 380 (8th Cir. 1994) (concluding that filing administrative consent order counted as "commencement' because interested third parties had right to intervene and certain notice and hearing procedures became available); *Public Interest Research Group, Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1173 (D.N.J. 1993) ("Order and Notice, issued pursuant to state regulations specifically providing for due process protections in the initiation of enforcement proceedings, was the actual initiation or 'commencement' of an enforcement proceeding").

letter to alleged water discharge permit violator setting administrative conference for which no public notice was provided and at which no hearing was held did not bar citizens' suit); *cf. PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618-19 (7th Cir. 1998) (noting in context of the bar Resource Conservation and Recovery Act (RCRA) places on citizens' suits when judicial action has been commenced, that "writing a letter would hardly be described as 'commencing' or 'prosecuting' an 'action' . . . , especially when we consider the interminable character of much administrative process and the difficulty of deciding on a threshold below which the process is too tentative to justify barring a citizen's suit") (citations omitted).

Discerning from these various decisions the contours of the law, we conclude that with respect to administrative enforcement actions, the "commencement" of the action is tied in with the "comparability" of the state statute to the federal provisions. Specifically, we hold that for the purposes of § 1319(g), an administrative action "commences" at the point when notice and public participation protections become available to the public and interested parties. Because Wisconsin law does not authorize administrative penalty proceedings or fines, there are no administrative enforcement provisions "comparable" to those of the Clean Water Act. Rather, when WisDNR decides that a violation requires enforcement, Wisconsin law provides that WisDNR "shall refer the matter to [WisDOJ] for enforcement," and WisDOJ "shall initiate the legal action requested by" WisDNR. *Wis. Stat.* § 283.89(1)-(2). MMSD admits that Wisconsin's permissive intervention statute is triggered only when the administrative enforcement advances to the stage at which a legal action is filed. (MMSD's Br. at 39.) Thus, in Wisconsin, the "formal moment" at which an action is commenced is when WisDOJ files a complaint with state or federal court because "from this formal moment enforcement

becomes public." *Wisconsin Envtl. Law Advocates v. Wisconsin Power & Light Co.*, 03-C-0739-S, at 17 (W.D. Wis. May 3, 2004).

We conclude that the non-judicial actions taken by the State did not commence an administrative action barring the plaintiffs' suit under § 1319(g), because at no point prior to the filing of the Milwaukee County suit did the state's administrative enforcement procedures contemplate public notice and participation. Although the filing of the 2001 Stipulation was a judicial action, there was no opportunity provided for public notice or participation. Moreover, as we noted earlier, the 2001 Stipulation was not a diligently prosecuted action because it was not legally binding and was withdrawn by the 2002 Stipulation. And the Milwaukee County action was filed too late. Because the State did not timely "commence" and diligently prosecute an administrative enforcement action, the plaintiffs' suit for civil penalties is not barred by § 1319(g). And, as we have already concluded, the plaintiffs' suit is not barred under § 1365(b)(1)(B) by any of the State's judicial enforcement actions.

B. Res judicata

The district court found that the 2002 Stipulation "is drafted to resolve all potential liability for the alleged sanitary sewer overflows occurring after 1994 and bring MMSD into compliance with the WPDES permit." (PSA at 24.) It went on to conclude that, in addition to being barred under the Act by prior actions taken by the State, the plaintiffs' suit would also be barred under res judicata. According to Wisconsin law,

> [u]nder the doctrine of claim preclusion, a subsequent action is barred when the following three factors are present: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with

jurisdiction; and (3) identity of the causes of action in the two suits.

Sopha v. Owens-Corning Fiberglas Corp., 230 Wis. 2d 212, 233-34, 601 N.W.2d 627 (Wis. 1999).

The plaintiffs do not challenge that the second element has been established. They do, however, challenge whether the plaintiffs' causes of action were the same as those brought by the State in the Milwaukee County action and whether MMSD has demonstrated that the State was in privity with the plaintiffs.

1. Identity of causes of action

Wisconsin takes a "transactional" approach to determining whether there is an identity of causes of action. *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). "What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, [and] whether they form a convenient trial unit. . . ." *Id.* at 554.

The plaintiffs argue that their suit is broader and different in scope than the State's 2002 suit in Milwaukee County. The plaintiffs point to specific differences, including their allegations of violations from 165 locations (as opposed to on 8 occasions); a higher volume of unpermitted discharges (900 million gallons as opposed to 471 million gallons); dry weather discharges from sanitary sewers; MMSD's "consistent operational and management problems that have significantly contributed to the exceedingly high number and volume of unpermitted discharges" (Plaintiffs' Br. at 44); and additional violations, including one in August 2002 involving 412 million gallons of sewage that was not covered by the 2002 Stipulation (which resolved MMSD's liability for all

SSOs "to the latest date upon which either of the parties executes this agreement" *(id.* at 45)).

All of the plaintiffs' purported pre-Stipulation differences are swallowed up by the 2002 Stipulation's broad scope. The 2002 Stipulation was intended to "present[] a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error." (Plaintiffs' Sep. Appx. at 178-79.) It purported to relieve MMSD from liability for *all* violations up to the date the 2002 Stipulation was executed, including those that were not specifically alleged in the State's complaint. Thus, there is an undeniable identity of causes of action with respect to the pre-Stipulation violations.

As for post-Stipulation violations, there are two reasons why the unspecified ongoing or continuing violations alleged in the plaintiffs' complaint do not constitute a separate and distinct cause of action. First, the Act itself bars the bringing of any action "prior to sixty days after the plaintiff *has given notice of the alleged violation"* to various parties. 33 U.S.C. § 1365(b)(1)(A) (emphasis added). This notice must contain "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, [and] the date or dates of such violation." 40 C.F.R. § 135.3(a). As the Supreme Court has noted, the purpose of this notice is twofold: it "allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," and it "gives the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'" *Hallstrom v. Tillamook County*, 493 U.S. 20, 29, 107 L. Ed. 2d 237, 110 S. Ct. 304 (1989) (internal citation omitted). Even if the

unspecified violations, such as the August 2002 violation, were sufficiently well-pleaded by references to "ongoing or continuing" violations, they were not mentioned in the required notice and would therefore be barred by the Act, at least as part of this particular suit.

The second reason why the unspecified post-Stipulation violations are not separate and distinct causes of action is that the 2002 Stipulation was intended to address the underlying causes of the continuing violations by implementing remedial measures some of which, due to their large scale, will take several years to complete. The State was unquestionably aware that violations would continue while the projects mandated by the 2002 Stipulation are being implemented. Even though the 2002 Stipulation does not release MMSD from liability for post-Stipulation violations, those post-Stipulation violations are clearly related in origin to the pre-Stipulation violations and have the same factual basis. Thus, the August 2002 violation (and other post-Stipulation violations) not specifically mentioned in the 2002 Stipulation are not separate and distinct causes of action, and the element of res judicata requiring an identity of causes of action is met here.

2. Privity of the parties

We agree with the district court that a person not a party to a previous action can be said to be in privity with an "official or agency invested by law with authority to represent the person's interests." Restatement (Second) of Judgments § 41(1)(d). Thus, "even when an agency enforcement action is not commenced until after the citizen suit, final judgment in the agency's court action will be a res judicata or collateral estoppel bar to the earlier citizen suit." *Comfort Lake Ass'n v. Dresel Contracting*, 138 F.3d 351, 356 (8th Cir. 1998). This, however, presumes that the agency was acting in its *parens patriae* role as a representative of the public. As a representative of the public's interests, the State is subject to the

exceptions enumerated in section 42 of the Restatement (Second) of Judgments, including the following: "A person is not bound by a judgment for or against a party who purports to represent him if...the representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent." Restatement (Second) of Judgments § 42(1)(e). Thus, in order for the state agency to be in privity with the public's interests, the state's subsequently-filed government action must be a diligent prosecution. And if the subsequently-filed government action is a diligent prosecution, "the fact that . . . any . . . private attorney general is barred from duplicating that effort should hardly seem surprising or harsh."[9] *Hudson River Fishermen's Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988), *quoted in United States EPA v. Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990). So the question becomes whether the State's action was diligent.

We look to the language of the Act to find out what is meant by "diligent prosecution." Citizens' suits are barred "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State *to require compliance with the standard, limitation, or order."* 33 U.S.C. § 1365(b)(1)(B) (emphasis added). Thus, if the judicial action is "capable of requiring compliance" with the Act and is "calculated to do so," the

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[9] We decline to adopt the plaintiffs' argument that "in a situation where a citizen suit has been filed prior to the State's commencement of an enforcement action, the privity element of res judicata can never be satisfied." (Plaintiffs' Br. at 40.) *See Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) ("However, we do not believe the Clean Water Act can or should be read to discourage a governmental enforcement action once a citizen suit has been commenced nor to prevent state or local authorities from achieving a settlement as to conduct that is the subject of a citizen complaint. To hold otherwise would likely lead to underenforcement of the Clean Water Act.").

citizens' suit will be barred. Jeffrey G. Miller, "Overlooked Issues in the 'Diligent Prosecution' Citizen Suit Preclusion," *10* Wid. L. Symp. J. 63, 84, 85 (2003). Notwithstanding these considerations, diligence does not require a state agency to have perfect foresight. As we have previously held in the context of the RCRA, which has a materially similar diligent prosecution requirement, "[t]he statute does not require that the [State] succeed; it requires only that the [State] try, diligently." *Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992).

The district court found that the 2002 litigation and Stipulation represented a diligent prosecution because the 2002 Stipulation was intended by the parties to present "a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error" (PSA at 22) and to "bring MMSD into compliance with the WPDES permit" *(id.* at 24). The 2002 Stipulation requires significant changes to MMSD's operating structure at considerable expense, including storage and conveyance capacity expansions and treatment plant and interceptor sewer upgrades. MMSD was obligated to complete its sanitary sewer evaluation study and to require satellite municipalities to reduce inflow and infiltration by 5% by the end of 2002. MMSD was additionally required to implement a CMOM plan by June 30, 2007, which is intended to help reduce (with the goal of eliminating) all non-permitted SSOs. (Plaintiffs' Sep. Appx. at 184.)

We recognize that diligence on the part of the State is presumed. *See, e.g., Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986) ("[T]he court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith.").

We surmise that this presumption is due not only to the intended role of the State as the primary enforcer of the Clean Water Act, *see Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987), but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems. *See North & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991). Yet, we think a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement. Our diligent prosecution analysis of the 2002 Stipulation will examine whether it is capable of requiring compliance with the Act and is in good faith calculated to do so. *See* Miller, *supra*, 10 Wid. L. Symp. J. at 84, 85.

The plaintiffs raise several concerns about the diligence of the 2002 Stipulation that can be easily dispensed with, and one which we think has merit. All are nonetheless worth discussing. First, the plaintiffs argue the 2002 Stipulation is not a diligent prosecution because it does not include a provision expressly requiring compliance with MMSD's WPDES permit and the Act. MMSD rejoins that, it is not necessary to include language requiring compliance because the Act and Wisconsin's permitting statute themselves require compliance, and the 2002 Stipulation does not relieve MMSD from its obligation to comply. The State is not prevented from bringing enforcement actions if post-Stipulation violations occur. Moreover, MMSD points out that adding compliance language would not bring about compliance absent treatment of the underlying causes of the violations. *See Clean Air Council v. Sunoco, Inc.*, 2003 U.S. Dist. LEXIS 5346, at *15-*16 (D. Del. 2003) (rejecting a plaintiff's contention that the state's consent order should have included language requiring compliance and focusing the diligent prosecution inquiry on the actions required to eliminate the cause of the violations).

We agree that the focus of the diligent prosecution inquiry should be on whether the actions are calculated to eliminate the cause(s) of the violations. Since MMSD was not relieved from complying with the Act and its permit, the addition of compliance language in the present circumstances is unnecessary and would not bring about compliance any faster or more efficiently.

The plaintiffs also argue that the 2002 Stipulation gives MMSD until 2010 to complete construction of certain sewer improvements which are not guaranteed to result in compliance with the Act. MMSD points out that the deadlines are necessary "because of the actual amount of time it takes to plan, solicit bids, and construct public works of this magnitude." (MMSD's Br. at 25.) The deference we owe to the State's actions comes into play in determining whether these deadlines are too lengthy to be diligent: as we have said, we are not in the business of constructing sewage facilities. We conclude that the construction deadlines incorporated in the 2002 Stipulation are not so lengthy as to indicate a lack of diligence. "Merely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity Appellant desires does not entitle Appellant to injunctive relief." *Scituate*, 949 F.2d at 558, *quoted in Supporters to Oppose Pollution*, 973 F.2d at 1324.

The plaintiffs also allege that the 2002 Stipulation does not address the violations that are due to operational failures and mismanagement, though the only specific MMSD policy the plaintiffs have pointed out as mismanagement is the policy of reserving a certain amount of Deep Tunnel capacity to handle wet-weather SSOs, resulting in larger-than-necessary CSOs.[10]

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[10] This policy was first mentioned by the plaintiffs at oral argument when discussing MMSD's "mismanagement." Prior to that, the plaintiffs had never specified which operational or management problems were causing violations.

Specifically, after a July 1999 storm that resulted in a 62.2 million gallon SSO, MMSD increased the volume of capacity it reserves in the Deep Tunnel to accommodate sanitary sewage, from 40 million gallons to 200 million gallons. (PSA at 241.) Although this policy has reduced the volume of SSOs, it did so by allowing CSOs instead, even at times when the Deep Tunnel was not filled to capacity. *(Id.)* The 2002 Audit Report estimated that the volume of CSOs between 1994 and July 2002 would have been reduced by 656 million gallons if unused capacity had not been kept in reserve. (PSA at 242.) But the solution to this problem requires accurate prediction of weather patterns and storm intensity. MMSD's current automated system lacks the sophistication to permit precise predictions of sewage flow, and this, combined with the well-known inaccuracies of weather forecasts, means that discharge decisions are frequently made with incomplete information. (PSA at 243.) MMSD is, however, installing a $ 3.3 million Real Time Control System that provides updated information on system performance every 15 minutes or less, which should help MMSD maximize existing system capacity during heavy storms. (PSA at 298.) We also note that the CSOs caused by MMSD's reservation of Deep Tunnel capacity to handle sanitary sewage were not violations of the Act or of MMSD's permit. Though we question the permitting decision that has created the incentive for MMSD to avoid violations by shifting its discharges from SSOs to larger-than-necessary CSOs during heavy storms, we cannot say that MMSD's reserve capacity policy is not in compliance with the Act or its permit."[11]

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[11] "Mechanical failures have also caused some SSOs, but they represent less than half of one percent of the total volume discharged from sanitary sewers from 1994-2002. *Id.* at 234. MMSD confirmed at oral argument that its dry weather SSOs were caused by equipment malfunction.

Although the reasons contributing to MMSD's recent massive and distressing discharges of sewage indicate that MMSD may not have put all of its operational and management difficulties behind it, the plaintiffs' vague allegations that the 2002 Stipulation fails to address MMSD's operational and management difficulties are insufficient to indicate that MMSD will thereby be prevented from complying with the Act after work mandated by the 2002 Stipulation is completed. If any additional operational or management problems have become evident since the 2002 Stipulation,[12] the State and MMSD are entitled by the Act to an opportunity to resolve them before the plaintiffs may jump into the fray.

The last of the easily-disposed-of arguments is that the 2002 Stipulation imposes no penalties for past violations, nor does it include stipulated penalties for future violations. Basically, the plaintiffs seem to want us to announce a rule that diligence requires penalties. With respect to the lack of

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[12] *See, e.g.*, Resler, *The Sound of Lame Excuses,* MILWAUKEE J. SENTINEL, May 20, 2004, at 22A ("Officials of the Milwaukee Metropolitan Sewerage District said this week that for an 18-hour period in the middle of last weekend's massive dumping of raw sewage, only one of the three giant pumps critical to the operation of the district's controversial deep tunnel system was actually working. As storms drenched the area, that left just one pump to transfer millions of gallons of sewage from the deep tunnel, where it is stored, to the district's two treatment plants."); *id.* ("[A] construction project—the replacement of two huge galvanized steel holding tanks on Jones Island—effectively reduced capacity at the district's two treatment plants. Critics have wondered why the tanks are being replaced now during the rainy season, a legitimate point."); Steve Schultze and Marie Rohde, *Equipment Glitches Still Plague MMSD,* MILWAUKEE J. SENTINEL, June 17, 2004, at 1A ("MMSD officials [agreed] that yet another project—replacement of giant sewage holding tanks—also probably contributed to the overflows, but only slightly. . . . Only one or two of the three giant tunnel pumps were used during the May rains and dumping because the holding tanks are under construction and several months past their projected completion date.").

penalties for pre-Stipulation violations, MMSD argues that under *Gwaltney* and the First Circuit's interpretation of it in *North & South Rivers Watershed Ass'n v. Town of Scituate*, the government may choose to forego civil penalties in favor of securing expensive capital improvements. Given that the focus of our inquiry is on whether the State's actions are going to bring about compliance, the presence or absence (or, for that matter, the size) of penalties does little, on its own, to shed light on the diligent prosecution inquiry. It is true that compliance may be coerced by penalties if they are sufficiently high to deter the violations. *See* Miller, *supra*, 10 Wid. L. Symp. J. at 86. In order to have a deterrent effect, the penalty must be high enough that the violator would find it less expensive to take whatever actions are necessary to comply than to continue violating. This is why courts have considered whether penalties are assessed and whether the amount of the penalty has taken into account the economic benefit the violator derived from non-compliance. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 890 F. Supp. 470, 489-95 (D.S.C. 1995), *vacated on other grounds*, 149 F.3d 303 (4th Cir. 1998), *rev'd on other grounds*, 528 U.S. 167, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).

But penalties are by no means a *requirement* for compliance to be assured. Repeated violations due to the same underlying systemic causes are likely to continue until a large-scale remedial project addressing those underlying causes is completed (assuming the large-scale project will successfully and permanently abate the conditions causing the violation). And large-scale remedial projects, as we have earlier noted, can take years. We agree with the First Circuit that "duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [the goals of the Clean Water Act]. They are, in fact, impediments to environmental remedy efforts." *Scituate*, 949 F.2d at 556;

see also Peter A. Appel, "The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation," 10 Wid. L. Symp. J. 91, 101-02 (2003) (noting that allowing citizens' suits for penalties to proceed when expensive remedial action is required both hinders negotiated settlements and is unlikely to help the environment). Levying additional penalties on violators who are undertaking massive remedial projects will not bring about compliance any faster or cause the result to be any more effective--it will just cause the result to be more expensively arrived at.

As for the post-Stipulation violations, although it is true that there are no provisions for stipulated penalties in the 2002 Stipulation, MMSD points out that neither does it prevent the State from bringing subsequent enforcement actions for subsequent violations. The concern with diligent enforcement is *whether* violations are prosecuted, not *how* they are prosecuted. *See Clean Air Council*, 2003 U.S. Dist. LEXIS 5346, at *11-*12 (finding that stipulated penalties are just as diligent as seeking the same penalty in a separate enforcement action). If the State fails to diligently prosecute post-Stipulation violations, the plaintiffs may prod it into action, as they did here.

We do, however, share the plaintiffs' concern that the planned improvements to MMSD's system under the 2002 Stipulation may not in fact result in MMSD's eventual compliance with the Act and its permit. (*See* Plaintiffs' Br. at 30-31; Reply Br. at 6.) The 2002 Audit Report attributed MMSD's overflows to the magnitude of storms in recent years, as well as capacity issues in the Deep Tunnel and MMSD's sewers and treatment facilities. (PSA at 231.) During planning for the Deep Tunnel, the capacity requirements were estimated based on the largest storm previously recorded in the Milwaukee area, which occurred in June 1940. (PSA at 234.) However, from the time the Deep Tunnel came on line in 1994 through July 2002, there were

five storms larger than the June 1940 storm of record, resulting in discharges of 394.7 million gallons from sanitary sewers and over 4 billion gallons from combined sewers. (PSA at 235.) Not only has the Deep Tunnel been unable to handle storms larger than it was designed for, but it has also proved insufficient to capture wastewater from storms smaller than the storm of record on nine occasions, resulting in SSOs totaling approximately 528 million gallons. (PSA at 236.) The Deep Tunnel was also planned based on assumptions that infiltration and inflow from surrounding communities would be reduced by 12.5%; they have instead increased by 17.4%. (PSA at 237.) Sedimentation has further reduced available capacity in the Deep Tunnel by a small amount (2.1 million gallons). (PSA at 240.)[13]

We do not deny that increasing the storage and conveyance capacity in MMSD's system should reduce the number and volume of overflows. But MMSD itself admits that what the 2002 Stipulation accomplishes is the eventual *reduction* of overflows, not elimination of them. As MMSD pointed out to the plaintiffs, "[t]he Northwest Side Sewer Relief Project is intended to have sufficient capacity to capture most of the volume of events comparable to those experienced since the start up of the Inline Storage System....Reduction in *number of SSO events* is contemplated; not a *percent reduction in total volume of SSO's*." (MMSD's Supp. Appx. at 98; *see also* MMSD's Br. at 46 (noting that the State accomplished "guaranteed meaningful relief in the form of capital improvements and operational changes that will *actually reduce the number of overflow events*") (emphasis added).) Compliance means an *end* to violations, not merely a reduction in

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[13] A problem related to siphons in the sewer system is causing a significant amount of wastewater to be diverted into the Deep Tunnel rather than being treated immediately by the treatment plant (PSA at 239), but MMSD began a project in 2001 to improve the efficiency and capacity of these siphons, which is expected to be completed in 2007 (PSA at 299).

the number or size of them. That is why courts have considered whether the alleged diligent prosecution achieves a permanent solution or whether violations will continue notwithstanding the polluter's settlement with the government. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127-28 (2d Cir. 1991); *New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation,* 772 F. Supp. 162, 168 (S.D.N.Y. 1991).

Contrary to the district court's finding, we do not feel confident that the 2002 Stipulation will indeed result in elimination of the root causes underlying the large-scale violations alleged by the plaintiffs' regardless of the State's and MMSD's self-serving statements that it is intended to do so. We note the persistence of violations due to the same underlying causes even after the 1977 Stipulation was fully implemented (and despite a similar intention that the capacity-increasing projects would "eliminate dumping from sanitary sewers"[14]). We also note the perhaps overly cautious pace adopted by the State in evaluating the effectiveness of the remedial projects required by the 1977 Stipulation—it took eight years and a notice of intent to sue from the plaintiffs before the State took any actions that went beyond investigating and evaluating the violations that have persisted even after the Deep Tunnel came on line. While the projects mandated by the 1977 Stipulation may have been calculated in good faith to ensure MMSD's compliance, it should not have taken the State so long to arrive at the conclusion that the Deep Tunnel had been under-designed. These, along with MMSD's own admissions that the 2002 Stipulation is aimed at reducing, not eliminating, violations, are insufficient to indicate a diligent prosecution.[15]

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[14] Schultze and Rohde, *supra* note 2, at lB.

[15] Of course, we are aware that here, as with other regulatory circumstances, "efforts to achieve 'the last 10 percent'" would be very expen-

Under the circumstances of this case, we cannot say that simply throwing more money at the problems and taking an inordinately long time to determine if enough money was thrown at the problems to solve them this time around are actions calculated in good faith to bring about compliance with the Act. The record to date does not inspire confidence that effective and timely action will be taken to address problems of long standing. While the 2002 Stipulation will hopefully result in fewer and smaller violations after the mandated projects are completed, it is still, when all is said and done, a stalling tactic rather than a compliance strategy. As such, we cannot say that it is a diligent prosecution, and we cannot uphold the district court's determination that res judicata bars the plaintiffs' suit.[16]

III. Conclusion

Because we cannot state with certainty on the basis of this record whether the 2002 Stipulation is calculated to result in compliance with the Act, we therefore remand for a determination of that issue. Specifically, the district court should determine whether the systemic inadequacies of MMSD's sewerage facilities will be sufficiently ameliorated by the

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sive. Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 28 (Harvard Univ. Press 1993). But we are not talking about whether the proposed remedial efforts will eliminate the last gallon of sanitary sewerage discharges in a 500-year storm; rather, we are concerned that the remedial projects may, after their completion, nonetheless turn out to be too little, too late.

[16] We therefore need not determine whether fairness would render res judicata inapplicable here. *See Froebel v. Meyer*, 217 F.3d 928, 935 (7th Cir. 2000) ("Wisconsin law does not treat res judicata as an ironclad rule which must be implacably applied whenever its literal requirements are met, regardless of any countervailing considerations.") (internal quotations omitted); *McCourt v. Algiers*, 4 Wis. 2d 607, 91 N.W.2d 194, 196 (Wis. 1958) (indicating that res judicata may not apply where relitigation is necessary to prevent unfairness).

proposed remedial projects to result in compliance. If the district court concludes, after giving some deference to the judgment of the State, that there is a realistic prospect that violations due to the same underlying causes purportedly addressed by the 2002 Stipulation will continue after the planned improvements are completed, the plaintiffs' suit may proceed. If, after a more detailed examination of the 2002 Stipulation, the district court concludes that no such prospect exists, it may so find, provide a thorough explanation of its conclusion and consider reinvocation of the res judicata bar. However, before reimposing a res judicata bar, the district court should determine whether Wisconsin's fairness exception to the res judicata doctrine should be applied here.[17]

Although we have allowed the plaintiffs' suit to continue (at least for the time being), we hope that the State, together with the parties in this matter, will take advantage of this opportunity to review the efficacy of the 2002 Stipulation in light of recent events and will be able to resolve their differences as well as the problems affecting MMSD's system. For the reasons stated above, the district court is REVERSED, and the suit is REMANDED for further proceedings in keeping with this opinion.

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[17] As Wisconsin's Supreme Court has noted, "claim preclusion may be disregarded in appropriate circumstances when the policies favoring preclusion of a second action are trumped by other significant policies. Claim preclusion . . . is a principle of public policy applied to render justice, not to deny it. Any exception to claim preclusion, however, must be limited to special circumstances or the exceptions will weaken the values of repose and reliance." *Sopha*, 230 Wis. 2d at 236.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. WISCONSIN

No. 02-C-0270

FRIENDS OF MILWAUKEE'S RIVERS and
Lake Michigan Federation,
Plaintiffs,

v.

MILWAUKEE METROPOLITAN SEWAGE DISTRICT,
Defendant.

Sept. 29, 2003.

Karen Mala Schapiro, Frazer Schapiro & Rich, Milwaukee, WI, *James A. Vroman*, *Katharine Saunders*, Stephen Safranski, *Steven M. Siros*, Jenner & Block, *Laurel O 'Sullivan*, Chicago, IL, for Plaintiffs.

James M. Caragher, Katherine E. Lazarski, *Linda E. Benfield*, Foley & Lardner LLP, Milwaukee, WI, for Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, DENYING AS MOOT

DEFENDANT'S MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING RESOLUTION OF MOTION TO DISMISS, AND DISMISSING CASE

CLEVERT, J.

This case is before the court on defendant Milwaukee Metropolitan Sewerage District's Motion to Dismiss. Plaintiffs, Friends of Milwaukee's Rivers ("FMR") and Lake

Michigan Federation ("LMF"), brought a citizen-suit under the Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251, *et seq*. According to the Milwaukee Metropolitan Sewerage District ("MMSD"), the suit is barred because the state, under the oversight of the United States Environmental Protection Agency ("U.S.EPA"), has utilized both judicial and administrative enforcement mechanisms to diligently prosecute MMSD for CWA violations. 33 U.S.C. § 1319(g)(6)(A)(ii). After hearing oral argument and reviewing the submissions of the parties, the court agrees that this suit is barred and will grant defendant's motion to dismiss.

FINDINGS OF FACT

MMSD is a state-chartered, special purpose government agency providing wastewater services for all or part of 28 municipalities in Southeast Wisconsin. The District's 420-square-mile service area includes all cities and villages (except the City of South Milwaukee), within Milwaukee County and all or part of 10 municipalities or sanitary districts in the surrounding counties of Ozaukee, Washington, Waukesha and Racine. (Aff. McCabe, ¶ 3)

Two types of municipality-owned sewer systems feed into MMSD's interceptor sewers. Many older sewer systems are considered "combined sewers" because the sewers are designed to carry storm water and sanitary sewage. Combined sewers are located in some parts of the City of Milwaukee and in parts of Shorewood. The remainders are "separate sewers" where storm water drains into a storm water sewer system that empties directly into area waterways. Water from sanitary sewers empties into the MMSD system and is carried to treatment plants. (Aff. McCabe, ¶ 5)

The current MMSD Wisconsin Pollution Discharge Elimination System (WPDES) Permit No. WI-0036820-1 allows six Combined Sewer Overflows (CSOs) each year.

The permit prohibits Sanitary Sewer Overflows (SSOs), except in limited situations, such as preventing loss of life or severe property damage. (Aff. McCabe ¶ 9, Ex. B)

To resolve the pending motion to dismiss, the relationship between the WDNR, U.S. EPA, and the MMSD over the past twenty-five years must be examined. In 1976, the Sewerage Commission of the City of Milwaukee (MMSD's predecessor organization) brought an action against the WDNR challenging treatment standards at municipal waste water facilities. *The Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of Milwaukee v. State of Wisconsin Department of Natural Resources,* Dane County Circuit Court Case No. 152-342. The WDNR responded by filing counterclaims against the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee, alleging sanitary sewer overflows (SSOs), combined sewer overflows (CSOs), and other practices in violation of the CWA and the District's Wisconsin Pollutant Discharge Elimination System Permit.

The Dane County Circuit Court action was resolved by a Stipulation and Judgment on May 25, 1977. The 1977 Stipulation and Judgment included a construction compliance schedule for projects to increase system capacity (including minimum annual expenditures for the construction projects), the requirement to eliminate dry weather bypassing from the system by July 1, 1982, the requirement that flows from separate sewer areas meet federal and state effluent requirements, and the obligation to correct wet weather bypassing from the combined sewer areas of the MMSD service area. In addition, the Stipulation and Judgment imposed a "waste load allocation system" which effected a moratorium on new sewer construction in certain communities. (Pl. Ex. A)

To comply with the requirements of the Dane County Stipulation and Judgment, the MMSD developed the 2001

Facility Plan. That Plan included projects for the construction of several large interceptor sewers, construction of an Inline Storage System (the "Deep Tunnel"), numerous improvements to two treatment plants and rebuilding a biosolids processing facility. Completion of these projects cost over $2.3 billion. (Aff. McCabe, ¶ 14) Ultimately, the Plan was approved by the WDNR and the U.S. EPA after public input.

Compliance with the stipulated schedule for the required capital improvements was monitored closely by the WDNR, through a process called the "Annual Schedule Establishment." Under the ASE process, a construction schedule was submitted each year by MMSD to the WDNR for its approval. If the WDNR agreed with MMSD's proposed schedule, it was entered as a court order in the Dane County Circuit Court. Each year, as required by the 1977 Stipulation, the MMSD reported to the WDNR on compliance with its construction schedule in a "Compliance Audit Report." The final ASE under the Stipulation governed construction during 1993, and the last significant project completed under the Stipulation was the Deep Tunnel. (Aff. McCabe, ¶ 15)

In September 1994, MMSD requested that the WDNR agree to dismiss the Dane County Circuit Court action, as all necessary construction was completed. The WDNR refused citing its need to have sufficient time to evaluate MMSD's compliance with the Stipulation. MMSD made similar requests for dismissal in 1995, 1996, and 1997. Nonetheless, the WDNR reiterated opposition to dismissal due to its ongoing assessment of MMSD's compliance with the stipulation and its desire to have access to the Dane County Court in the pending case should further enforcement action become necessary. (Aff. McCabe, ¶ 18, Ex. D; Aff. Lazarski ¶ 5, Ex. 1)

In 1996, MMSD began development of the 2010 Facilities Plan. The letters submitted by MMSD confirm that WDNR was involved in the planning process, and that the WDNR

approved the Facilities Plan on December 9, 1998, following public review and an opportunity for public comment. (Aff. McCabe, ¶ 20, Ex. E)

On January 6, 2000, the U.S. EPA and WDNR held the first of two meetings between the agencies to coordinate their enforcement efforts against MMSD. (Aff. Lazarski ¶¶ 6-7, Exs. 2 and 3) At the January 6, 2000, meeting, representatives from the two agencies discussed the importance of consistent enforcement actions nationwide, the importance of infiltration and inflow control by the local communities, the problem of using sanitary sewers to carry storm water, and the implementation of a Capacity, Management, Operation and Maintenance (CMOM) self-auditing program. (Aff. Lazarski, ¶ 6, Ex. 2) A second meeting held on May 24, 2000, addressed the complexities of the SSO problem and the need to address SSOs from the MMSD and the local communities with a single effort. Participants discussed various strategies and enforcement options, including imposition of civil penalties. (Aff. Lazarski ¶ 7, Ex. 3)

By letter dated June 16, 2000, the WDNR advised Anne Spray Kinney, the MMSD Executive Director, of the "Department 's ongoing review of [MMSD] bypass reports to determine compliance with Wisconsin Pollutant Discharge Elimination System (WPDES) permit conditions and applicable Wisconsin Administrative Codes." The letter advised MMSD that it would be required to meet with the WDNR and U.S. EPA on July 12, 2000, to "report on your progress to reduce bypassing and outline your strategies to work with communities to reduce flows and bypassing." (Aff.McCabe, ¶ 21, Ex. F) During this time, the U.S. EPA was developing a proposed rule incorporating the CMOM self-auditing program into the agency's nationwide enforcement strategy. (Aff. Lazarski ¶ 13, Ex. 9, pp. 86-149, 237-242)

Following the July 12, 2000, meeting, the WDNR informed MMSD that "[G]iven this background and the frequency and volume of overflows in the Milwaukee area during 1999 and 2000," the WDNR Secretary George Meyer would be presenting a report to the Natural Resources Board at their January 2001, meeting. (Aff. McCabe ¶ 23, Ex. G) To prepare the report for the Board meeting, the WDNR developed a series of questions for consideration focusing on five interrelated topics: Separated Basin Performance, Overflow History, Preventing Separated Sewer Overflows, Minimizing Combined Sewer Overflows, and the Inline Storage System Operations. (Aff. McCabe ¶ 11, Exs. G and H) Further, MMSD was required to attend a meeting on December 13, 2000, between U.S. EPA and the WDNR, and the WDNR provided MMSD with a request for information. By letter dated December 18, 2000, MMSD reported to the WDNR the schedule under which it would be able to compile the information requested. (Aff. McCabe, Ex. H)

On March 16, 2001, the WDNR Secretary Darrell Bazzell transmitted to MMSD a copy of the Department's Report entitled "Sewer Overflows in Wisconsin--A Report to the Natural Resources Board." (Aff. McCabe, Exs. I and J) Two weeks later, the WDNR advised MMSD that a "series of near-term and long-term recommendations in the report" would require "additional work by, and interaction between, the District and the Department to assume the recommendations are fully implemented." (Aff. McCabe ¶ 26, Ex. K) The WDNR set forth five projects for MMSD to "focus on initially." (Aff. McCabe ¶ 26, Ex. K)/

Between February and July of 2001, the WDNR continued to investigate overflows to determine the compliance status of those events. (Aff. McCabe ¶ 27, Ex. L; Aff. Lazarski ¶ 8, Ex. 4) At the same time, MMSD responded to and clarified previous responses to requests for data. (Aff. McCabe ¶ 27, Ex. L)

On July 11, 2001, Attorney Shapiro, counsel for the Friends of the Milwaukee River (FMR) and Lake Michigan Federation (LMF), notified the Executive Director of MMSD of her intent to file a lawsuit against MMSD for violations of §§ 301 and 402 of the Clean Water Act, and MMSD's Wisconsin Pollutant Discharge Elimination System Permit. (Pl. Ex. C) The Notice of Intent to Sue (NIS) identified "at least thirteen occasions during which at least 165 SSO discharge locations within MMSD's jurisdiction discharged sanitary sewerage due to the 'deep tunnel' being filled to capacity." In addition, the NIS claimed that on "at least nine (9) occasions there were at least thirteen (13) SSO discharge locations that discharged sanitary sewerage because of insufficient conveyance capacity downstream from the sewerage discharge locations." (*Id.*)

Five days after the NIS letter, WDNR Secretary Bazzell notified MMSD that WDNR had determined that after 1994, eight of thirteen SSO events associated with the Inline System were violations of the WPDES permit, and that two events were in compliance with permit requirements. Three other events were due to causes which needed to be determined. (Pl. Ex. D) Further, all four events associated with hydraulic capacity in the Metropolitan Interceptor Sewer were violations. (Aff. McCabe, Ex. M) Bazzell stated:

> I want you to know that we are very appreciative of all the work the MMSD has done to comply with the requirements of your Wisconsin Pollutant Discharge Elimination System Permit. We also appreciate the District's commitment to implementing its 2010 Plan. However, current information indicates that projects envisioned in that plan will not be sufficient in their own right to achieve full compliance with applicable permit requirements. Therefore, we feel there is additional work to be done and that a long-term corrective action

> plan must be developed and placed into a legally binding format.
>
> I have notified appropriate legislators and Natural Resources Board members of our decisions and have directed staff to work with you and U.S. Environmental Protection Agency staff to arrive at a legally binding, long term corrective action plan. The long term corrective action plan needs to be consistent with the recommendations made in "sewer Overflows in Wisconsin—A Report to the Natural Resources Board" (March 15, 2001).

(Aff. McCabe, Ex. M)

The MMSD denied that any of the separate sewer overflow events from the MMSD system constituted WPDES violations. (Aff. McCabe, Ex. N) By letter dated August 22, 2001, Secretary Bazzell responded that although the parties disagreed on the compliance status of the overflow events, they agreed that corrective action is required. Bazzell directed staff to meet with MMSD to "discuss developing a legally enforceable long-term corrective action plan." (Aff. McCabe, Ex. O)

MMSD and the WDNR met during August 2001 to negotiate a corrective action plan, and the WDNR made a formal referral of the matter to the Wisconsin Department of Justice. (Aff. McCabe ¶ 31) On September 7, 2001, the Wisconsin Department of Justice filed a Stipulation and Proposed Order incorporating the corrective action plan between the MMSD and the WDNR in Dane Count Circuit Case No. 152-342. The new Stipulation required MMSD to complete three major new sewer capacity expansion projects; to complete all facilities in the approved 2010 Facilities Plan by a fixed date; to complete the 2020 Facilities Planning by December 31 2007; to complete the infiltration and inflow reduction program by a fixed date; and to develop and

implement a Capacity, Management, Operation and Maintenance Program no later than December 31, 2007. The Stipulation required MMSD to report on the progress toward meeting the requirements of the Stipulation. The estimated cost of the activities in the Stipulation is $907 million. (Aff. McCabe, ¶ 32, Ex. P)

Also, on September 7, 2001, MMSD's Director of Legal Services sent a copy of the Stipulation to counsel for LMF and FMR, Attorney Karen M. Shapiro. (Aff. McCabe ¶ 33, Ex. Q) The letter states, in part, "[A]fter your clients review the Stipulation, I am sure they will agree that it more than meets their concerns." (*Id.*) On October 19, 2001, Judge Moria Krueger of the Dane County Circuit Court stated her reluctance to sign the Stipulation and Proposed Order in a case "a quarter of a century old." (Aff. McCabe ¶ 34, Ex. S) Judge Krueger wrote:

> From what has recently been presented, it looks as though further court "oversight" is contemplated for almost 20 more years. As is noted in the latest submission, judgment entered in this case in 1977. (There is also a 1976 judgment in the file). It does seem to me that at some point a court's involvement in a case must end. It also seems to me that this case has gone well beyond that point. Every encouragement is given to the parties to continue to resolve their disputes by written stipulation, but I do not understand why each agreement (contract) must convert to a court order in a 25 year old case. I also know of no case law mandating that I sign such on-going orders when presented to me, no matter how many years after judgment. If you know of such precedent, I would appreciate your sharing it with me.

Attorney Shapiro wrote to MMSD on October 10, 2001, acknowledging receipt of the Stipulation and requesting an opportunity to discuss the Stipulation with the MMSD and

WDNR. The parties agreed to meet on December 20, 2001. (Aff. McCabe, Ex. V) The U.S. EPA provided comments on the proposed Stipulation and Order to the WDNR in advance of the December 20, 2001, meeting. (Pl. Ex. L) The meeting was attended by representatives of MMSD, the Wisconsin Department of Justice, the DNR, U.S. EPA, and LMF and FMR and their attorneys. (Aff. McCabe, Ex. W) As a follow up to the meeting, Attorney Shapiro wrote the following letter to MMSD and Assistant Attorney General Eric J. Callisto:

> Thank you for meeting with Friends of Milwaukee's Rivers ("FMR") and Lake Michigan Federation ("LMF") on Thursday, December 20, 2001, to discuss the above-referenced stipulation.
>
> I am writing to confirm our understanding of what was agreed to in terms of next steps. Specifically, by January 11, 2002, Eric Callisto will inform LMF/FMR whether or not the Wisconsin Department of Justice ("DOJ") can formally commit to defer from filing a complaint or complaint and stipulation against MMSD until March 15, 2002, at the earliest. If the DOJ can make such a commitment, LMF and FMR will likewise agree not to file suit before March 15, 2002.
>
> LMF and FMR will provide DNR, DOJ and MMSD with written comments concerning the Stipulation by January 31, 2002. The parties also agreed to schedule a second meeting to discuss the stipulation and DNR's, MMSD's and DOJ's response to the LMF/FMR comments. The meeting is currently set for 10:30 a.m. on February 19, 2002, at MMSD's offices.

Assistant Attorney General Eric J. Callisto agreed that the Wisconsin Department of Justice would not file a complaint or complaint and stipulation against the Milwaukee Metropolitan Sewerage District prior to March 15, 2002. (Aff. McCabe, Ex. X) A letter from the U.S. EPA to the WDNR

dated January 8, 2002, states that the U.S. EPA supports the WDNR taking the lead in negotiating a resolution to the MMSD's CSOs and SSOs problems, and that the CWA requirements would be satisfied if the EPA comments were incorporated into the Stipulation. (Aff. Lazarski ¶ 10, Ex. 6) Attorney Shapiro provided the comments on the stipulation to the Wisconsin Department of Justice and MMSD on January 31, 2002, and a second meeting was held on February 19, 2002. (Aff. McCabe, Ex. Y)

Prior to the February 19, 2002, meeting, Attorney Shapiro acknowledged MMSD's offer to make additional files available to LMF and FMR for their review. (Aff. McCabe, Ex. Y) In addition, Attorney Shapiro wrote to McCabe and Callisto on March 7, 2002, supplementing a settlement proposal with a request for attorney's fees and costs in the amount of $110,000. (Aff. McCabe, Ex. Y)

On March 15, 2002, at 7:57 a.m., plaintiffs filed this suit. Later that day, the Wisconsin Department of Justice filed an action against MMSD in Milwaukee County Circuit Court. The Milwaukee County suit alleged eight violations of MMSD's WPDES permit based upon sanitary sewer overflow events on August 27, 1995, June 16, 1996, April 8, 1999, April 21, 1999, June 12, 1999, May 17, 2000, August 5, 2000, and September 11, 2000. The complaint sought forfeitures as provided in Wis. Stat. § 283.91(2), a 23% penalty assessment pursuant to Wis. Stat. 757.05(1), a 10% environmental assessment pursuant to Wis. Stat. § 299.93(1), a 1% jail assessment pursuant to Wis. Stat. § 302.46(1), court costs and disbursements, including attorney fees, as well as injunctive relief. (Pl. Ex. N; Aff. McCabe, Ex. Z)

The EPA provided additional comments on the Stipulation to the WDNR on April 4, 2002. (Aff. Lazarski ¶ 11, Ex. 7) On May 17, 2002, the DOJ filed a revised Stipulation and Proposed Order resolving the state's claims against MMSD. (Aff. McCabe, Ex. AA) The Stipulation and Order was signed

by Milwaukee County Circuit Court Judge Mel Flanagan on May 29, 2002. The Final Stipulation states:

> . . . in lieu of a penalty assessment or other monetary sanction, the establishment of a legally binding long-term corrective action program for future water pollution abatement construction projects . . . is consistent with the missions of both agencies to meet the requirements of the Federal and State Clean Water Acts, including the elimination of sanitary sewer overflows and the further reduction of combined sewer overflows, and to redress alleged sanitary sewer overflow violations of the District's WPDES permit; . . .

(Aff. McCabe ¶ 41, Ex. AA, p. 2)

Compliance with this Stipulation will increase the MMSD system's storage capacity by 116 million gallons (approximately 30%) and will force MMSD to implement the CMOM self-auditing program. The total cost of compliance with this Stipulation is estimated at approximately $907 million dollars.

On the federal level, the U.S. EPA filed a ten-page request for information with the MMSD under Section 308 of the Clean Water Act, 22 U.S.C. § 1318(a) in November of 2001. The request focused on MMSD's system operation, capacity and overflow history. The MMSD responded to this request with four cartons of information on February 14, 2002. (Aff. McCabe ¶ 36, Exs. T and U) In addition, a letter dated August 1, 2002, to Congressman Jan Schakowsky of Chicago, Illinois, from Christine Whitman, Chief U.S. EPA, explains the U.S. EPA's role in supervising the CSOs and SSOs that have occurred in Milwaukee:

> The United States Environmental Protection Agency (EPA) has been working with the Wisconsin Department of Natural Resources (the Department) and other concerned parties on the issues of CSO and SSOs for

> several years, and has been taking an active role in these matters. Prior to the State's filing of the stipulation and order against MMSD addressing SSOs, we participated in discussions with the Department, MMSD, and Environmental groups to develop a strategy to address the overflow problems. EPA is committed to working with the State on reissuance of its National Pollutant Discharge Elimination System (NPDES) permit to MMSD, which will include a long-term control plan to address the CSO problems. EPA supports the State's decision to issue individual NPDES permits to the MMSD service communities. The permits will include a commitment to control inflow and infiltration, which contribute to MMSD's overflows.

Attached to the letter is a fact sheet detailing "the positive steps that the Department, MMSD, and EPA, have taken toward correcting the difficult problem of wet weather overflows." (Supp. Aff. Lazarski ¶ 4, Ex. C) The fact sheet explains that the U.S. EPA Region 5 has issued information requests to three MMSD service communities and one to MMSD. "The purpose of the requests is to obtain the latest technical information so that U.S. EPA can make an informed decision on permitting and, if necessary, enforcement." Continuing, the fact sheet states that the EPA strategy to date has been to follow the State lead on the issue while maintaining a federal presence. (*Id.*)

In their submissions, plaintiffs have included several articles from the Milwaukee Journal Sentinel covering the MMSD and sewage dumping by MMSD after the 2002 Stipulation and Order was signed by Milwaukee County Circuit Judge Flanagan. (Pl. Exs. P, Pl. Ex. To Sur-Reply, A-E)

CONCLUSIONS OF LAW

A. Standard on a Motion to Dismiss

The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depends upon the purpose of the motion. 2 James Wm. Moore et al., Moore's Federal Practice, ¶ 12.30[4] (3d ed. 2003). If the motion simply challenges the sufficiency of the allegations of subject matter jurisdiction, "the court must accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of the plaintiff." *Transit Exp., Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001) (citing *Rueth v. EPA*, 13 F.3d 227, 229 (7th Cir. 1993)). If, however, the motion denies or controverts the truth of the jurisdictional allegations, it is permissible for the court to "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993).

B. Subject Matter Jurisdiction

Plaintiffs assert that this court has subject matter jurisdiction over their claims pursuant to § 505(a) of the CWA. Under § 505(a), a suit to enforce any limitation in an NPDES permit may be brought by any "citizen," defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), (g). Sixty days before initiating a citizen suit, however, plaintiffs must give notice of the alleged violation to the EPA, the State in which the alleged violation occurred, and the alleged violator. § 1365(b)(1)(A). The Act bars citizens from suing if the EPA or the State has already commenced, and is "diligently prosecuting," a civil or criminal action. 33 U.S.C. § 1365 (b)(1)(B); 33 U.S.C. § 1319(g)(6).

In cases such as this, deference to governmental enforcement agencies is appropriate because the CWA delegates

primary enforcement responsibility to designated state and federal agencies. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 890 F.Supp. 470, 487 (D.S.C.1995). For example, the requirement in section 505(b)(1)(A) that citizens file a notice letter sixty days before bringing a private enforcement suit was designed to give the governmental agencies the "first shot" at enforcement. *Id.* As the Supreme Court explained, "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.*, (quoting Gwaltney *of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987)). Such limitations on citizen suits "allow for smoother operation of ordinary enforcement mechanisms" and encourage out-of-court settlements between agencies and polluters. *Id.*, (citing *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F.Supp. 173, 179, 186 (D.Conn. 1991), *aff 'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993); *cf. Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (action under the Resource Conservation and Recovery Act (RCRA), stating: "An Administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation. . . . To say . . . that the EPA is not 'diligently prosecuting' the action if it does not sue the person, or use the theories, the plaintiff prefers would strip EPA of the control the statute provides.").

MMSD argues that dismissal is appropriate under two sections of the CWA. The first is 33 U.S.C. § 1365(b)(1)(B), which provides that no action may be commenced "if the Administrator [of the EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." MMSD submits that the State, under the oversight of the U.S. EPA, has commenced and prosecuted judicial enforcement actions diligently in Dane County and Milwaukee County Circuit Courts. The second is

33 U.S.C. § 1319(g)(6), which provides in relevant part, that any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, . . . shall not be the subject of a civil penalty action under . . . section 1365 of this title."

Under either limitation, plaintiffs bear the burden of proving that the state agency's prosecution was not diligent. *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997). This burden is heavy because diligence on the part of the enforcement agency is presumed. *See Connecticut Fund For Environment v. Contract Plating Co., Inc.*, 631 F.Supp. 1291, 1293 (D.Conn.1986). As several courts have recognized, "the state [enforcement] agency must be given great deference to proceed in a manner it considers in the best interests of all parties involved." *Arkansas Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark.1993), *aff'd,* 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S.Ct. 1094, 130 L.Ed.2d 1062 (1995).

With respect to the first limitation on citizen suits, MMSD argues that the WDNR has maintained an open judicial action against MMSD since 1976 in Dane County Circuit Court, and more recently in Milwaukee County Circuit Court. From 1977 through 1994, the WDNR required the submission of and court approval for annual compliance reports and construction schedules. The WDNR refused to dismiss the 1976 Dane County action notwithstanding repeated requests by the MMSD in 1994, 1995, 1996, and 1997. Throughout 2000 and 2001, the WDNR investigated overflows from the MMSD system and concluded they were permit violations requiring a "legally binding corrective action plan." The WDNR referred the matter to the Wisconsin Department of Justice which filed the corrective action plan, in the form of a Stipulation and Order, with the Dane County Circuit Court in 2001. The Stipulation and Order addressed post-1994 SSO

events, and was revised following U.S. EPA and citizen comment. After the Wisconsin Department of Justice filed a judicial enforcement action in Milwaukee County Circuit Court on March 15, 2002, the revised Stipulation was approved on May 29, 2002. Plaintiffs had the opportunity to intervene in the Dane County and Milwaukee County actions, but failed to do so. Wis. Stat. § 803.09.

Not surprisingly, plaintiffs have a different view of the facts. They claim that the 1977 and 2002 Stipulations were "sweetheart deals," and that the WDNR filed its only judicial enforcement action in Milwaukee County Circuit Court after plaintiffs issued their NIS and filed this lawsuit. According to plaintiffs, the March 15, 2002, complaint filed in Milwaukee County Circuit Court and the 2002 Stipulation procedurally and substantively fall short of "diligent" prosecution.

Plaintiffs first take issue with the timing and manner in which the Milwaukee County action and the Stipulation were filed. They clarify that the WDNR did not commence the 1976 action, but rather filed a counterclaim in the action commenced by MMSD's predecessor. Therefore, the Milwaukee County action is the only enforcement action "commenced" by the WDNR and Wisconsin Department of Justice.

Next, plaintiffs note that the WDNR returned to the Dane County Circuit Court nearly twenty-five years later seeking the entry of a "new" stipulation. The new stipulation was filed just one business day before the expiration of the sixty-day tolling period initiated by the LMF and FMR's NIS. LMF and FMR were not invited to comment on the Stipulation until after it was filed with the Dane County Circuit Court. Finally, Wisconsin Department of Justice filed the enforcement action in Milwaukee County Circuit Court after plaintiffs filed their citizen suit with this court.

A closer look at the documents on file undermines plaintiffs' arguments. The 1977 Stipulation and Order filed in Dane County Circuit Court was drafted to address the "bypass and overflow discharges" and expresses the parties intent to "settle the above entitled action by agreeing to a program of pollution abatement projects to be carried out in the District." (Pl. Ex. A, p. 3) Paragraph 11 of the Stipulation provides that the "Judgment entered pursuant to this Stipulation shall remain in full force and effect until all the terms and conditions of the Judgment have been fulfilled, or until otherwise modified by the Court." Clearly, the parties and the court contemplated ongoing supervision. Stipulations were entered as orders in 1982, 1984, 1985, 1986 (March and December), 1987, 1989 (May and December), 1991, 1992, and 1994 with Dane County Circuit Judge Moira Krueger entering 1991, 1992, and 1993 orders. (Supp. Aff. McCabe, Exs. A-K) Moreover, the 1977 Stipulation refers to dollar equivalents in 1996.

It is equally clear that the parties viewed the 2001 Stipulation as a continuation of the 1976 enforcement proceedings. The 2001 Stipulation refers to the May 25, 1977, Stipulation, as well as the 1982-1983, 1984, 1986, 1987, 1987, 1991, 1992, and 1993, orders. It seeks to enforce violations of the same CWA discharge permit consistently reissued since 1977.[1] (Supp. Aff. McCabe, Ex. L, ¶ 23, Ex. M, pp. 51-52) Like the 1977 Stipulation, the 2001 Stipulation addresses dry and wet weather overflows, and mandates three extensions of the Deep Tunnel.

That the parties viewed the court as retaining jurisdiction is underscored by the WDNR's repeated refusal to dismiss the case in 1994, 1995, 1996, and 1997. Each time that MMSD requested dismissal, the WDNR opposed the request citing

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[1] The permit was renewed in 1974, 1978, 1983, 1989, 1997, and 2003. (Supp. Aff. McCabe, ¶ 13)

the need for sufficient time to evaluate MMSD's compliance. For example, a September 20, 1994, letter from the WDNR to a Senior MMSD Staff Attorney mentioned four reasons for the WDNR's refusal to dismiss the Dane County action simply because the Inline System was operational. (Aff. Lazarski, ¶ 5, Ex. 1) In addition, a January 7, 1997, letter from the WDNR to a Senior MMSD Staff Attorney, explained that "if the water quality standards are not being met, then provisions of the Stipulation would still be relevant." (Aff. McCabe, Ex. D)

To the extent that plaintiffs place great reliance on the attempt to file the 2001 Stipulation at the end of the sixty-day period, the record reveals that the WDNR investigated overflows that occurred from the MMSD system during 2000 and 2001 to determine if the events were in compliance with MMSD's WPDES permit. (Aff. McCabe, ¶¶ 21 -28) These events proceeded plaintiffs' NIS. When WDNR concluded that certain overflow events were permit violations, it notified MMSD that a "legally binding corrective action plan" would be required and negotiated the plan. The WDNR referred the matter to the Wisconsin Department of Justice, which submitted the corrective action plan, the Stipulation and the Proposed Order, to the Dane County Circuit Court on September 7, 2001. MMSD provided plaintiffs with a copy of the Stipulation and notified them of the submission in the Dane County Court case.

Of note is that on October 19, 2001, Dane County Circuit Judge Krueger sent a letter to the parties indicating her reluctance to keep a file open another twenty years as contemplated by the 2001 Stipulation. However, Judge Krueger did not disapprove the Stipulation, and was willing to store the Stipulation with the file. Significantly, she made no finding that the court lacked subject matter jurisdiction or authority to enter additional orders. Rather, she felt that it was time "for the case to be over." (Aff. McCabe, Ex. S)

Soon thereafter, the Wisconsin Department of Justice planned to file the Stipulation in Milwaukee County Circuit Court. Plaintiffs admit that the parties *mutually agreed* not to file any action until March 15, 2002, to allow plaintiffs time for comment on the Stipulation. A December 28, 2001, letter from plaintiffs ' attorney Karen Shapiro to Assistant Attorney General Eric J. Callisto and Attorney Michael J. McCabe states: "I am writing to confirm our understanding of what was agreed to in terms of next steps. Specifically, by January 11, 2002, Eric Callisto will inform LMF/FMR whether or not the Wisconsin Department of Justice ('DOJ') can formally commit to defer from filing a complaint or complaint and stipulation against MMSD until March 15, 2002, at the earliest. If DOJ can make such a commitment, LMF and FMR will likewise agree not to file suit before March 15, 2002." (Aff. McCabe, Ex. X) By letter dated January 9, 2002, Callisto confirmed that the Wisconsin Department of Justice would not file suit prior to March 15, 2002. (*Id.*) In the interim, plaintiffs submitted their comments as did the U.S. EPA, and the record indicates that the comments were considered. Nevertheless, plaintiffs filed the pending action in the Eastern District of Wisconsin on 7:57 a.m. of March 15, 2002. Although plaintiffs' filing preceded the WDNR's filing in Milwaukee County Circuit Court by several hours, it did not precede the administrative and judicial action taken in Dane County Circuit Court.

With respect to plaintiffs' substantive challenges to the Final Stipulation, they claim that, like its 1977 predecessor, the Final Stipulation does not require MMSD to comply with the CWA.[2] The Final Stipulation provides the District with a

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[2] The 2002 Stipulation filed in Milwaukee County Circuit Court rescinds the Stipulation dated September 7, 2001, filed in the Dane County case of *Sewerage Commission of the City of Milwaukee, et al. v. State of Wisconsin, et al.*, Case No. 152-342. (Aff. McCabe, Ex. Z, ¶ 16) It

grace period until 2010 to complete construction of certain sewer improvements, but does not require MMSD to assure WDNR or the general public that such actions will result in compliance with the CWA. The Final Stipulation imposes no penalties for past violations or stipulated penalties for future violations of the CWA or the Final Stipulation. Further, the March 15, 2002, Complaint and the Final Stipulation fail to address all of the allegations in plaintiffs' Amended Complaint.

These arguments fail as well. The Final Stipulation need not address each allegation in the plaintiffs' Complaint and Amended Complaint as long as it is based upon identical violations. *See Connecticut Fund for the Env't*, 631 F.Supp. at 1293 ("A federal court ought not to allow a citizens' suit to proceed merely because a prior pending state suit has not alleged as many separate violations of the Act as has the citizens' suit. . . . ") The Final Stipulation expresses the "intent of the parties" to present "a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error. This Stipulation therefore resolves the District's potential liability for all alleged sanitary sewer overflows to the latest date upon which either of the parties executes this agreement." (Aff. McCabe, Ex. Z, p. 2)

The Final Stipulation requires significant changes to MMSD's current operating structure at considerable expense. MMSD must complete construction of a 7.4 mile, 20 foot diameter relief sewer on the northwest side of Milwaukee to add 89 million gallons of storage capacity by December 31, 2006, construct two additional sewers adding 27 million gallons of conveyance capacity by December 31, 2009, and complete over 100 treatment plant and interceptor sewer

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further provides that "[a]ll other stipulations previously entered as orders in Dane County Case No. 152-342 continue in full force and effect." (*Id.*)

upgrade projects. In addition, MMSD is obligated to finalize its sanitary sewer evaluation study and to require satellite municipalities to achieve a 5% reduction of infiltration and inflow by December 31, 2002. The Final Stipulation addresses the overflow related deficiencies identified in the Legislative Audit Bureau Report.

Because the court concludes that the WDNR, under the oversight of the U.S. EPA, has diligently prosecuted MMSD through administrative efforts and a judicial enforcement action, there is no need to address defendant's remaining arguments. In any event, the court finds persuasive defendant's contention that this lawsuit is subject to dismissal under the doctrine of res judicata because plaintiffs' claims were settled in the Final Stipulation entered by the Milwaukee County Circuit Court. Under Wisconsin law "the doctrine of claim preclusion, or res judicata, provides that a 'final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions or occurrences.'" *See Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 998-999 (7th Cir. 2000). Wisconsin courts impose three prerequisites for claim preclusion: "(1) an' identity between the parties or their privies in the prior and present suits'; (2) the 'prior litigation resulted in a final judgment on the merits by a court with jurisdiction'; and (3) an 'identity of the causes of action in the two suits.'" *Remer*, 205 F.3d at 999.

Courts have held that, in situations such as this, the citizens' action provision of the CWA casts the citizen in the role of a private attorney general, thereby satisfying the privity requirement. *U.S. EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1403 (8th Cir.1990); *see also Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir.1990). In addition, Milwaukee County Circuit Court Judge Mel Flanagan signed the Final Stipulation and Order on May 29, 2002. The Order provides that the Final

Stipulation is approved, made part of the record, and made binding upon the parties. (Aff. McCabe, Ex. AA) The Final Stipulation is drafted to resolve all potential liability for the alleged sanitary sewer overflows occurring after 1994 and bring MMSD into compliance with the WPDES permit. (*Id.*) Therefore, the Final Stipulation and Judge Flanagan's May 2002, Order address the same subject matter as plaintiffs' Amended Complaint, which alleges SSO violations beginning January 1, 1995, and seeks an injunction requiring MMSD "to take all action necessary to meet the requirements of its WPDES permit and Clean Water Act with respect to SSOs." (Doc. # 5) It follows, that res judicata bars further litigation of the issues raised in the Amended Complaint.

Lastly, the court is mindful that plaintiffs had requested additional time to conduct discovery. However, this case has been pending well over one year. During that time, the court denied MMSD's motion for protective order staying discovery pending resolution of the motion to dismiss. The motion for additional time indicated that plaintiffs requested depositions of WDNR employees, and had been granted access to WDNR files. Further, the Supplemental Affidavit of Katherine E. Lazarski indicates that plaintiffs were provided access to MMSD files and made formal requests of the WDNR under the Wisconsin Freedom of Information Act. Plaintiffs sought from the WDNR all documents from the years 1994-2001 relating to discharges from the MMSD's SSO to surface waters, discharge monitoring reports, and separate sewer overflow quarterly monitoring reports for the Jones Island and South Shore Wastewater Treatment Plants of MMSD, and sampling results for fecal coliform and coliform bacteria relating to releases from MMSD's SSO's and sampling results for fecal coliform and coliform bacteria from groundwater monitoring wells identified in MMSD's discharge permit. (Aff. Lazarski ¶ 7, Ex. F) Plaintiffs have not asserted that they were denied any of those materials or have

they identified any information that they would seek if further discovery were allowed.

Now, therefore,

IT IS ORDERED that the defendant's motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for protective order staying discovery pending resolution of motion to dismiss is DENIED as moot.

IT IS FURTHER ORDERED that this case is DISMISSED with prejudice.]

Dated at Milwaukee, Wisconsin, this 29th day of September, 2003.

By the Court

/s/ C. N. Clevert, Jr.
U.S. District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

[Filed Mar 03, 2004]

Case No. 02-CV-270

FRIENDS OF MILWAUKEE'S RIVERS
LAKE MICHIGAN FEDERATION,
Plaintiffs,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
Defendant.

ORAL DISPOSITION
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CHARLES N. CLEVERT,
UNITED STATES DISTRICT JUDGE
Milwaukee, Wisconsin
September 29, 2003
10:45 a.m.

REPORTED BY:

JOHN SCHINDHELM, RMR. CRR,
Federal Official Court Reporter
United States District Courthouse
517 East Wisconsin Avenue, Rm. 236
Milwaukee, Wisconsin 53202
Chambers: (414) 297-4167

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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ALSO PRESENT:

MICHAEL MCCABE, MMSD Director of Legal Services

DENNIS GRZEZINSKI, Chairman of MMSD

PROCEEDINGS

THE CLERK: Case number 2002-C-270, *Friends of Milwaukee Rivers v. Milwaukee Metropolitan Sewerage District*. This matter is before the court for oral disposition. May we have the appearance, please?

MR. VROMAN: Good morning, Your Honor, Jim Vroman on behalf of Plaintiff Lake Michigan Federation.

MS. SCHAPIRO: Karen Schapiro on behalf of Friends of Milwaukee River and Lake Michigan Federation.

MS. O'SULLIVAN: Laurel O'Sullivan on behalf of Lake Michigan Federation.

MR. CARAGHER: Good morning, Your Honor, James Caragher and Linda Benfield from Foley & Lardner, Michael McCabe who is MMSD's Director of Legal Services, and Dennis Grzezinski the Chairman of MMSD, all in behalf of the Defendant Milwaukee Metropolitan Sewerage District.

THE COURT: Good morning to everyone. I do apologize for the delay in getting started this morning. I was on a hearing involving a person complaining that they had failed to receive necessary medical treatment for hepatitis C and are incarcerated. We had at least six or seven people on various telephones and it was difficult to hear and slow-going. As a consequence we were not able to start on time.

In any event I would like to apprise you where I believe this case must go.

First of all, I looked at all of the submissions of the parties and took into consideration the last set of documents that I asked you to file so that I could best analyze the posture of the proceedings in Dane County that were filed in 1976.

As a consequence of that I've come to the conclusion that the DNR, Wisconsin Department of Natural Resources, under the oversight of the United States Department of—U.S.

Environmental Protection Agency, has diligently prosecuted MMSD through administrative efforts and judicial enforcement action.

Moreover, as a result of the proceedings that were brought by the state in the Milwaukee County Circuit Court resulting in the final stipulation and settlement which was approved by Judge Mel Flanagan, this court is of the view that the doctrine of claim preclusion or res judicata would preclude further prosecution of this action. And so, it is the conclusion of this court that this case must be dismissed.

This has not been an easy case to resolve; however, the court is mindful that this case resulted from a race to the courthouse after the parties had engaged in certain discussions and had assured each other that no action would be filed I believe before March 15. This case was initiated only hours before the Milwaukee Circuit Court action.

I'm also mindful that the plaintiffs in this action had the opportunity to intervene in Milwaukee County and to be heard fully. That there may be issues that they would have addressed or treated differently is of no consequence now.

In addition, it is clear that during the course of proceedings in Dane County, and notwithstanding the age of that case, the State and MMSD treated the Dane County case as an open case. Multiple stipulations were reached and the court was contacted multiple times over the years for the purpose of entering various orders.

In particular, I'm mindful of Judge Krueger's letter which gave rise to the Milwaukee action. Judge Krueger did not say the Dane County court lacked jurisdiction. Indeed, the essence of her letter was there comes a time when a case must close. That in and of itself is not enough to conclude that the Dane County case was not an active prosecution of MMSD, or that the issues that give rise to this action were not being addressed and/or prosecuted vigorously.

The court will therefore issue its final written decision as soon as it can be completed. Hopefully that will be no later than tomorrow.

Are there any questions regarding what I've said?

MR. VROMAN: Not from plaintiffs, Your Honor.

MR. CARAGHER: No, Your Honor.

THE COURT: Again, I apologize for my delay this morning, but it was unavoidable.

With that we stand in recess.

(Hearing concluded at 10:52.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, do hereby certify that I reported the foregoing proceedings had on September 29, 2003, and that the same is true and correct in accordance with my original machine shorthand notes taken at said time and place.

/s/ John T. Schindhelm
JOHN T. SCHINDHELM
Official Court Reporter
United States District Court

Dated this 8th day of October, 2003 Milwaukee, Wisconsin.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed October 1, 2004]

03-3809

FRIENDS OF MILWAUKEE'S RIVERS and
LAKE MICHIGAN FEDERATION,
Plaintiffs-Appellants,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
Defendant-Appellee.

OPINION

JUDGES: Before Hon. RICHARD D. CUDAHY, *Circuit Judge*, Hon. ILANA DIAMOND ROVNER, *Circuit Judge*, Hon. DIANE P. WOOD, *Circuit Judge*.

ORDER

On consideration of the petition of Defendant-Appellee for rehearing with suggestion for rehearing *en banc* filed September 16, 2004, in the above-captioned case, all of the judges on the panel voted to deny a rehearing, and no member of the court has voted to hear this case *en banc*.

Therefore, the petition for rehearing with suggestion for rehearing *en banc* is DENIED.

Additionally, the opinion rendered in this case is hereby amended to reflect the following minor addition: In footnote 1, the portion of the second sentence that reads "the dumping of 'an unprecedented 4.6 *billion* gallons of raw sewage' directly into Lake Michigan" shall be changed to read "the

dumping of 'an unprecedented 4.6 *billion* gallons of raw sewage' (more precisely, rainwater laced with raw sewage) directly into Lake Michigan." (Slip Op. At 3 n.1.)

APPENDIX E

28 United States Code § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX F

33 United States Code § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter " means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.[1]

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[1] So in original.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

APPENDIX G

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

[Filed May 29, 2002]

Case No. 02-CV-2701

STATE OF WISCONSIN,

Plaintiff,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant.

STIPULATION

WHEREAS, the State of Wisconsin has sued the Milwaukee Metropolitan Sewerage District (District), alleging that at least 8 sanitary sewer overflow events associated with filling of the District's Inline System since 1994 are violations of the District's Wisconsin Pollution Discharge Elimination System (WPDES) permit;

WHEREAS, these events are described by date in the State of Wisconsin's March 15, 2002 Complaint, and each date listed may refer to a sanitary sewer overflow event that occurred over more than one consecutive calendar day;

WHEREAS, the State of Wisconsin has reviewed all reports of potential and confirmed sanitary sewer overflows made by MMSD to the Department of Natural Resources (Department), including reports contained in Five Day Notice Letters, Quarterly Overflow Reports, and Compliance &

Maintenance Annual Reports pursuant to NR 208 (collectively, District Reports). Based on this review, the State of Wisconsin has identified overflows in addition to those specifically listed in the Complaint. It is the intent of the parties that this stipulation presents a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error. This stipulation therefore resolves the District's potential liability for all alleged sanitary sewer overflows to the latest date upon which either of the parties executes this agreement. To the extent that any other sanitary sewer overflows identified in the District Reports constitute permit violations, those violations are addressed through this stipulation;

WHEREAS, the District denies that it has violated its permit or the Federal and State Clean Water Acts;

WHEREAS, the State, through the Wisconsin Department of Natural Resources (Department), believes that, in lieu of a penalty assessment or other monetary sanction, the establishment of a legally binding long-term corrective action program for future water pollution abatement construction projects as identified in the Department-approved 2010 Facilities Plan and in future planning for the year 2020 is consistent with the missions of both agencies to meet the requirements of the Federal and State Clean Water Acts, including the elimination of sanitary sewer overflows and the further reduction of combined sewer overflows, and to redress alleged sanitary sewer overflow violations of the District's WPDES permit;

WHEREAS, the parties wish to resolve their dispute in order to avoid the cost and uncertainty of further litigation;

NOW, THEREFORE, it is hereby stipulated by and between the District and the Department that:

2010 FACILITIES PLAN; ADDITIONAL STORAGE AND CONVEYANCE CAPACITY; INSTRUMENTATION AND CONTROLS

1. The projects approved by the Department in the 2010 Facilities Plan as identified in Exhibit I hereto shall be fully constructed and operational no later than December 31, 2010. The current estimate of cost of each facility is also identified in Exhibit I.

2. In addition to the projects identified in paragraph 1 above, the District shall build additional storage and conveyance capacity as part of two projects previously approved by the Department, and shall add one new conveyance project. These three additional projects will increase the total storage in MMSD's deep tunnel system from 405 million gallons to approximately 521 million gallons, and are as follows:

A. An enlargement of the Northwest Side Relief Sewer Project, resulting in a 7.4 mile, 20-foot diameter sewer that will add approximately 89 million gallons of storage capacity to the existing conveyance system. The Department has approved construction of this project and it shall be constructed by no later than December 31, 2006.

B. An enlargement of the Wisconsin Avenue Sewer Project, which is planned to be approximately two miles long, 20 feet in diameter, and will add approximately 24.8 million gallons to the existing conveyance system. The Wisconsin Avenue Sewer Project shall be submitted to the Department for approval by no later than June 30, 2006 and, following approval, shall be constructed by no later than December 31, 2009.

C. The new project to be built is the Port Washington Road Sewer Project, which is planned to be approximately two miles long and 6 feet in diameter, and will add approximately 2.2 million gallons to the existing conveyance system. The Port Washington Road Sewer Project shall be submitted

to the Department for approval by no later than December 31, 2007 and, following approval, shall be constructed by no later than December 31, 2009.

3. As a component of the upgrade of its instrumentation and control (I & C) system, the District shall install a global predictive Real Time Control (RTC) system. The RTC system shall provide additional controls to maximize the use of the additional storage described in paragraph 2 above and upgrade the MIS flow monitoring network to assure that adequate wastewater flow data of the total flow is available for at least 75% of the total flow from the separate sewer tributary area. Additional rain gauges shall be added to the District's existing rain gauge network as necessary. A plan for implementing the global predictive RTC system and rain gauge data upgrade shall be completed and submitted to the Department by no later than December 31, 2002. The global predictive RTC system and the rain gauge data monitoring upgrade shall be constructed and fully operational by no later than December 31, 2004. The District shall provide for removal of daily infiltration and inflow from the deep tunnel system to the maximum extent practical to have maximum storage capacity available prior to any forecasted precipitation. The entire upgrade to the I & C system shall be completed by no later than December 31, 2008.

2020 FACILITIES PLAN

4. The 2020 Facilities Planning Project shall identify capital improvements necessary to handle wastewater conveyance, storage and treatment needs through 2020. The State, through the Department of Natural Resources, acknowledges that the District plans to spend approximately $28.4 million on this plan between 2001 and 2007. Development of the 2020 Facilities Plan shall include upgrading the Geographic Information System (GIS), a complete Environmental Assessment, ongoing collection and preservation of

systems monitoring data, an active stakeholder involvement program, and development of a Wet Weather Control Plan. The level of protection design standard to be achieved under the 2020 Facilities Plan shall be consistent with applicable Wisconsin and federal law. The proposed 2020 Facilities Plan shall be adopted by the District Commission and submitted to the Department by no later than June 30, 2007. The Department shall issue its final determination on the 2020 Facilities Plan by no later than December 31, 2007. Following the Department's final determination on the 2020 Facilities Plan, or the conclusion of any administrative or judicial challenge thereto, the District and the Department may, subject to court approval, amend this Stipulation to include deadlines for the completion of all projects needed to ensure compliance with permit requirements.

INFILTRATION AND INFLOW (I/I) REDUCTION PROGRAM

5. The District shall undertake a program for I/I reduction that shall include the following:

A. The *limited sanitary sewer evaluation study* (LSSES) which was part of the 2010 Facilities Plan authorized the use of District funds ($9 million) to smoke test, inspect manholes and add flow monitors to the satellite systems. The LSSES shall be completed by no later than December 31, 2002. The 28 satellite municipalities shall in sum take actions to achieve a 5% reduction by no later than December 31, 2002, from those portions of the sanitary sewer system which are located in the public right of way.

B. *I/I Reduction Demonstration Projects*. Eight satellite municipalities have been selected for the performance of I/I reduction demonstration projects on their systems. The bulk of this work, which began in 2000, consists of identifying the source and the cost and benefit of removing I/I on private property. The I/I reduction demonstration projects shall be

constructed and operational by no later than December 31, 2002. Ongoing post construction monitoring shall begin by no later than January 1, 2003. These projects will provide information on costs and repairs which may be used to specify a more universal approach throughout the service area.

C. *I/I reduction on private property*. The District has initiated a project for I/I reduction on private property. This project shall evaluate the information from the limited sanitary sewer evaluation studies/sanitary sewer evaluation studies and from the related I/I reduction demonstration projects to develop a regional approach to reduce I/I on private property. The project shall prioritize "sewersheds" by their rates of I/I and require by District rule the 28 satellite municipalities to systematically make improvements to those sewersheds to reduce excessive I/I on private property and ultimately reduce public health and safety concerns caused by such I/I. This is a multi-year project. The District's share of the project will be budgeted annually based on the priority and estimate of cost for each sewershed. The current estimate of costs for the Six Year Capital Improvement Plan period is $2.85 million as described in Exhibit I. The District rules requiring these improvements shall be adopted by no later than June 30, 2007.

D. The District has adopted a regional stormwater rule which requires the use of best management practices in order to mitigate the negative impacts of stormwater runoff to the District's system. The purpose of the regional stormwater rule is to: reduce the unsafe conditions, property damage, economic losses and adverse health effects caused by flooding; improve the effectiveness of flood abatement facilities and watercourse improvements; reduce the number and magnitude of releases of wastewater to the environment from sanitary and combined Sewers and protect wastewater collection and treatment facilities from high flows; promote com-

prehensive watershed planning and intergovernmental cooperation; and restore and enhance opportunities to use and enjoy the watercourses in the District service area. The District shall report annually to the Department regarding its regional stormwater rule enforcement efforts.

CAPACITY, MANAGEMENT, OPERATION AND MAINTENANCE (CMOM) PROGRAM

6. Combined sewer overflows and sanitary sewer overflows present important concerns for public health and the environment. The State, through the Department of Natural Resources, acknowledges that the District has accomplished significant reductions in the number of overflows experienced within the District's Metropolitan Interceptor Sewer System through implementation of the Water Pollution Abatement Program (WPAP).

7. While sanitary sewer overflows in the District's system have been significantly reduced, there are still sanitary sewer overflows within the District's and its satellite municipalities' sanitary sewer systems. To continue the District's program to reduce with the goal of eliminating all non-permitted sanitary sewer overflows, the District shall implement a regional Capacity, Management, Operation and Maintenance (CMOM) program. The regional CMOM shall be comprised of four integrated components:

A. *Management Plan.* A plan that outlines the goals of the CMOM, the organizational structure to manage it, the legal authority to control I/I, design criteria, benchmarking data and performance measures to attain the goals. A significant effort associated with the management plan shall be the development of an asset management program that provides for both programmed maintenance and tracking of the asset condition to enable early recognition of expansions or major rehabilitation necessary to avoid capacity limitations.

B. *Overflow Response Plan.* An overflow response plan that identifies measures to protect public health and the environment. This plan will outline the public notification, permit reporting, measuring and monitoring steps to be taken during an overflow event.

C. *System Evaluation and Capacity Assurance Plan.* A plan for system evaluation and capacity assurance for peak flow conditions. This plan shall identify necessary capital improvements to meet the projected flows and an implementation plan that describes timing and responsibilities for implementing each capital improvement.

D. *Communication and Program Audit Plan.* On a regular basis the District shall report to the Department on the implementation and performance of the CMOM program. The communication and program audit plan shall allow for public input during the development and implementation of the CMOM.

E. The approach to be used by the District to initiate and maintain the CMOM program shall include the following steps:

1) Retention of a consultant by no later than December 31, 2002, to provide program oversight and guidance.

2) Review of existing operations and existing management and capital improvement plans.

3) Development of an action plan to assess the required changes to existing plans and to develop a critical plan approach to a CMOM program.

4) Concurrent with previous steps, review of existing information on asset management, including field verification as required, and software development to provide a simplified data base to manage the capital assets of the District.

5) Open and maintain a CMOM dialog with the 28 satellite municipalities through the Technical Advisory Team[1] with the goal of assisting the satellite municipalities with developing individual CMOM programs. The District shall develop prospective measures for the satellite systems that will reflect the requirements of the District's regional CMOM program.

6) This entire CMOM initiative will be coordinated with the ongoing facilities planning and shall be completed by no later than June 30, 2007 and documented in the 2020 Facilities Plan to ensure future oversight of this program.

INPLANT DIVERSIONS DURING WET WEATHER

8. The Department and the District agree that diversions of wastewater flow within either of the two District treatment plants during wet weather events may occur only when all of the following conditions are met:

A. Inplant diversions may occur only when flows exceed the capacity of preliminary, primary or secondary facilities. During such inplant diversion the treatment system is operated as it is designed to be operated and in accordance with the conditions set forth in the District's WPDES permit.

B. The District's WPDES permit application provides notice of, and the permit specifically recognizes, the treatment scheme that will be used for peak flow management. The treatment scheme, including the designed capacity of various units, shall be consistent with generally accepted practices and design criteria.

C. The District's WPDES permit contains appropriate requirements for the collection system, including at a mini-

[1] The Technical Advisory Team (TAT) is a group organized by the District and is composed of members of the District's engineering star engineering staff from each of the 28 satellite municipalities, the Department, and the southeastern Wisconsin Regional Planning Commission.

mum, that the permittee properly design, operate, and maintain its collection systems and conform to the 1994 Combined Sewer Overflow (CSO) Control Policy.

D. The final discharge meets effluent limitations based on secondary treatment and any more stringent limitations necessary to meet water quality standards.

SATELLITE MUNICIPALITIES

9. Infiltration and inflow reduction efforts by the 28 satellite municipalities will continue to be required under District Rules, Chapter 3, Infiltration and Inflow Control. In addition, each satellite municipality shall be required, by District rules, to develop a local CMOM by no later than two years after completion of the District's regional CMOM Program. Prior to promulgation of the District rules, the Department may issue WPDES discharge permits to individual satellite municipalities, as necessary to require, *inter alia*, I/I reduction efforts by fixed dates. Following promulgation of the District rules, the Department may issue WPDES discharge permits to individual satellite municipalities, as necessary to require, *inter alia*, CMOM development and I/I reduction efforts by fixed dates.

LONG TERM CONTROL PLAN FOR COMBINED SEWER OVERFLOW

10. The State, through the Department of Natural Resources, acknowledges that the District is currently in full compliance with the provisions of WPDES PERMIT No. WI-0036820-1 regarding combined sewer overflows and the performance standards for the Inline Storage System (ISS) as stated at Section J.(I) of that permit. Those overflow frequency standards are based on the USEPA Combined Sewer Overflow (CSO) Control Policy. Further combined sewer overflow control will be achieved as the result of the District building additional separate sewer storage capacity in

accord with the approved 2010 Facilities Plan under the schedule described in paragraph 1 above, including the Northwest Side Relief Sewer, the Wisconsin Avenue Sewer, and the Port Washington Road Sewer. This additional separate sewer storage capacity will, under certain circumstances, have the effect of allowing additional capacity in the existing Inline Storage System to become available to store combined sewer flows which would otherwise be bypassed during unusually severe wet weather events. The effectiveness of these construction projects, the CMOM initiative, and the I/I reduction efforts of the satellite municipalities under the 2010 Facilities Plan will be evaluated as part of the 2020 Facilities Planning effort. The 2020 Facilities Plan shall make additional recommendations for further combined sewer overflow control as may be required by Wisconsin or federal law, and that Plan will constitute the District's Long Term Control Plan for CSO in accord with the U.S. EPA Combined Sewer Overflow Control Policy, 59 FR 18688. The proposed 2020 Facilities Plan shall be adopted by the District Commission and submitted to the Department by no later than June 30, 2007.

EXFILTRATION

11. A. Upon the startup of the Inline Storage System during late 1993 and early 1994, the District became aware that exfiltration of wastewater into the rock surrounding the tunnel appeared to occur during and after normal operation of the tunnel in fill events resulting from wet weather. The District notified the Department during 1994 of this fact. The WPDES discharge permit in effect at the time of tunnel start-up contained certain Operational Requirements (Section I(1)) and Monitoring Requirements for Groundwater Monitoring Wells and Piezometers (Section 1.(2)) which were based upon preconstruction prediction of ISS operation and which did not anticipate exfiltration during normal tunnel operation. Actual experience with tunnel operation revealed that certain,

terms of the permit were not achievable with normal tunnel operation during tunnel fill events.

B. After expiration of that discharge permit, the Department issued on June 29, 1997, a successor permit to the District, WPDES Permit No. WI-0036820-1. The successor permit also included the Operational Requirements and Monitoring Requirements for Groundwater Monitoring Wells and Piezometers which had appeared in the prior permit, but in addition included a Schedule of Compliance for the Inline Storage System. The overall purpose of the Compliance Schedule was to require the District to study the performance impacts of the ISS and to determine how to attain compliance with the requirements of the discharge permit.

C. These studies have been performed by hydrogeologists at the firm of Camp Dresser & McKee Inc. (CDM) on behalf of the District since the start up of the ISS in accord with the requirements of WPDES Permit No. WI-0036820-1, Section O., *Schedule of Compliance for Inline Storage System*, page 45. These reports are: (1) *Evaluation of Inline Storage System Groundwater Monitoring Data*, May 1995; (2) *Inline Storage System Evaluation of 1995 Groundwater Monitoring Data*, December 1996; (3) *Inline Storage System ISS/Bedrock Interaction Hydraulic Evaluation*, January 1998; and (4) *Inline Storage System Assessment of Tunnel Water Migration*, May 1998. The Department has evaluated these reports as they have been completed.

D. On the basis of these studies, CDM believes that some exfiltration of wastewater from the Inline Storage System (ISS) unavoidably occurs during normal tunnel operation at times when the ISS is used to store wastewater during wet weather events. CDM believes that the exfiltration which occurs does not, pose a danger to the aquifer since the wastewater exfiltrate begins to return to the tunnel system as soon as the pumpout of the tunnel system begins. The studies by CDM have verified the importance of maintenance of the

elevation minus 177.17 MMSD datum maximum fill level as a means of minimizing the impacts of tunnel exfiltration. The District has instituted operating changes to ensure that the minus 177.17 datum is not exceeded. The District shall undertake all reasonable efforts, when operating the tunnel, to minimize exfiltration from the ISS.

E. By letter dated August 27, 1997, the District filed a request for a contested case hearing challenging certain operational requirements imposed on the Inline Storage System under the successor permit, WPDES Permit No. WI-0036820-1, Section 1, *Inline Storage System, Requirements*, page 13. A copy of this hearing request is attached hereto as Exhibit II. The District filed the hearing request because, at the time of issuance of the successor permit, it believed that certain of the Operational Requirements stated in that permit were unachievable if the ISS was to be operated as it was intended, i.e., to store wastewater underground for later treatment. This contested case hearing request is currently pending, and the District and the Department have been meeting regularly since 1997 to discuss the CDM study results, the groundwater data gathered by the District, and the possible resolution of the issues raised in the pending hearing request.

F. As the result of the groundwater information gathered to date and analyzed by CDM, the District intends to conduct further studies in the areas of groundwater monitoring wells CT-MW-01 and CT-MW-07. The Department shall continue to evaluate the groundwater data gathered and reported by the District under the requirements of its WPDES permit. The Department may require additional reports on tunnel impacts to groundwater in a Compliance Schedule when the WPDES permit is reissued and may provide for appropriate operational limitations on the Inline Storage System in the next permit, expected to be issued during 2002.

DISCHARGE PERMIT

12. The Department's expected 2002 reissuance of the District's WPDES permit will be consistent with, but not limited to, the terms of this Stipulation. Except for the yet to be determined permit requirements arising from paragraph 11F, the District hereby agrees that it will not object to any permit condition which directly relates to any term of this Stipulation and which is contained in the WPDES permit which is expected to be reissued to the District by the Department during 2002.

13. Nothing in this Stipulation, unless otherwise expressly stated, prohibits the Department from amending or modifying the terms of the District's WPDES permit as required or permitted by state and federal law, or as subject to requirements for public notice and comment.

STIPULATION COMPLIANCE

14. A. A construction project approved under the 2010 Facilities Plan shall be deemed to be initiated in compliance with the terms of this Stipulation in the event the District awards a contract for the project, provided the contract is awarded by no later than December 31, 2009.

B. If the District determines that it will be unable to award a particular contract or take any other action in accordance with this Stipulation for any reason, the District shall notify the Department in writing of its determination including the reasons therefore. Such notification shall occur as soon as the District is reasonably able to predict it will not be able to meet the requirement(s) of this Stipulation. Within sixty days of the receipt of such notification, the Department shall either concur or disapprove in writing; the Department shall state its reasons for disapproval. Within fifteen days of the receipt of any such disapproval from the Department either party may move the court in this case for a resolution of the dispute(s).

15. The District shall provide to the Department an Annual Report by no later than December 31, 2001, and each year thereafter until 2010. The Annual Report shall summarize the projects completed to date and the current plan for completing the 2010 Facilities Plan projects; the Commission approved annual capital expenditure for the next year (i.e., the 2001 Annual Report will contain the 2002 approved capital budget); and a Master Program Schedule that reflects the projects in the then current Six Year Financial Plan. The Annual Report shall include all projects from the 2020 Facilities Plan included in this Stipulation under the provision of paragraph 4.

16. The parties expressly rescind the Stipulation dated September 7, 2001, and filed in the Dane County case of *Sewerage Commission of the City of Milwaukee et al. v. State of Wisconsin, et al.*, Case No. 152-342. All other Stipulations previously entered. as orders in Dane County Case No. 152-342 continue in full force and effect.

17. Except as between the parties hereto, nothing in this Stipulation should be construed as an admission of liability by the District to any of the allegations made in the same-captioned complaint.

18. The Court shall maintain continuing jurisdiction over this case in order to enforce the terms, conditions, and agreements in this Stipulation.

USE OF ACTUAL SIGNATURE TRANSMITTED BY FACSIMILE MACHINE

19. The parties agree that the approval of this Stipulation may be achieved by the actual signature of the parties' authorized representatives, a copy or facsimile of said actual signature being as valid as the original.

Dated: May 16, 2003

/s/ Michael J. McCabe
MICHAEL J. MCCABE
Director of Legal Services
Milwaukee Metropolitan
Sewerage District
State Bar No. 01011060

Susan B. Anthony
Senior Staff Attorney
Milwaukee Metropolitan
Sewerage District
State Bar No. 01017288

Attorneys for the Milwaukee Metropolitan Sewerage District

Dated: 5/17/02

/s/ Eric J. Callisto
ERIC J. CALLISTO
Assistant Attorney General
State Bar No. 01023016

Attorney for the State of Wisconsin

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

[Filed May 29, 2002]

Case No. 02-CV-2701
Case Code: 30703

STATE OF WISCONSIN,

Plaintiff,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant.

ORDER

The State of Wisconsin and Milwaukee Metropolitan Sewerage District, having executed the annexed stipulation, and the Court having reviewed the file herein,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That said stipulation is approved and made a part of the record herein and is hereby made binding on the parties.

2. That this Court has jurisdiction over the defendant and over the subject matter of this action.

3. That the defendant shall undertake the activities described in the annexed stipulation by and on the dates set forth in the stipulation, and shall comply in all respects with its obligations as set forth in this stipulation.

4. That no costs shall be awarded to either party upon entry of this Order.

Dated this 29th day of May, 2002.

BY THE COURT:

/s/ M. Flanagan
Circuit Court Judge